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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CON-
TEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS,
WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

Willaspie

VOL. CXVII.

CONTAINING

THE CASES ARGUED AND DETERMINED IN THE COURT OF QUEEN'S BENCH,
AND IN THE EXCHEQUER CHAMBER, IN HILARY VACATION, EASTER
TERM AND VACATION, TRINITY TERM AND VACATION,
AND MICHAELMAS TERM AND VACATION, 1871.

NEW YORK: J. B. LIPPINCOTT & CO. 1872.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 535 CHESTNUT STREET.

1872.

359723

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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED IN THE
COURT OF QUEEN'S BENCH,
AND THE
COURT OF EXCHEQUER CHAMBER,
ON APPEAL FROM THE COURT OF QUEEN'S BENCH.

**WITH TABLES OF THE NAMES OF THE CASES REPORTED AND CITED, AND
AN INDEX OF THE CONTENTS.**

BY
WILLIAM MAWDESLEY BEST, OF GRAY'S INN,
AND
GEORGE JAMES PHILIP SMITH, OF THE INNER TEMPLE,
ESQRS., BARRISTERS AT LAW.

VOL. V.

**CONTAINING THE CASES OF HILARY VACATION, EASTER TERM AND VACATION, TRINITY
TERM AND VACATION, AND MICHAELMAS TERM AND VACATION, 1864.**
XXVII. AND XXVIII. VICTORIA.

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CORRIGENDA.

In vol. 3, p. 28, line 7, for "Mellor, J.," read "Crompton, J."

In the head-note to Boulding v. Tyler, vol. 3, p. 472, for "does not recover," read "recovers."

In the Table of Cases to vol. 4, HUDSON v. MACRAE, p. 585, was accidentally omitted.

In The Sheffield United Gas Light Company, Appellants, The Overseers of Sheffield, Respondents, vol. 4, p. 144, West was with Maule, for the respondents.

JUDGES
OF
THE COURT OF QUEEN'S BENCH,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN, Bart.,
Chief Justice.

Sir CHARLES CROMPTON, Knt.

Sir COLIN BLACKBURN, Knt.

Sir JOHN MELLOR, Knt.

Sir WILLIAM SHEE, Knt.

Sir ROBERT LUSH, Knt.

ATTORNEY-GENERAL.

Sir ROUNDALL PALMER, Knt.

SOLICITOR-GENERAL.

Sir ROBERT PORRETT COLLIER, Knt

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CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH

IN

Milary Variation,

XXVII VICTORIA. 1864.

Willaspie

BENNISON v. CARTWRIGHT. Feb. 2.

Right of way.—Interruption.—Acquiescence.—2 & 3 W. 4, c. 71, s. 4.—Declarations.

Trespass for breaking and entering the plaintiff's garden. The defendant justified under two pleas, viz., the enjoyment as of right and without interruption of a way over the garden for twenty years and forty years respectively before the suit. At the trial it appeared that the plaintiff was tenant to W. L. of the garden, and the defendant was owner of premises comprising a cottage and yard, which had formerly been part of the estates of the L. family, with a privy in the yard abutting upon the garden, which privy had stood there for sixty years. J. L., who died in 1811, was owner of the garden and the premises belonging to the defendant, and devised certain of his estates, including those premises, to H. L. in trust to sell. H. L. sold various lots, and in 1812 W. became the purchaser of a lot which included those premises. In 1821 W. built the cottage, and on his death in 1849 the premises devolved to the defendant in right of his wife, who was heiress of W. In 1823 S. became tenant of the garden, and continued so until 1857. In 1830 he walled up stones against the opening of the privy into the garden, and W. knocked them down. S. complained of that act to H. L., who went with his agent to look at the place, and met there S. and W. Declarations of W. and H. L. on that occasion were admitted in evidence after objection by the plaintiff. A low wall was accordingly built round and a loose flagstone put at the top so as to form a cesspool, and the privy was cleaned out through the garden until about 1852. Under the will of J. L. the garden came to W. L. on his attaining the age of twenty-one years, in 1817. After the declarations were given in evidence, it appeared that H. L. was trustee of W. L. during his minority, and subsequently by his request received his rents. In October, 1861, the tenant of the garden, by direction of W. L. built a wall to prevent the defendant going through it. A correspondence between the attorneys for the defendant and W. L., in which there was a negotiation as to a reference of the matter to arbitration, began on the 28th December of that year, and continued until the 13th February, 1862. The trespass for which the action was brought was committed on the 3d February, 1862; and the writ issued on the following day. The Judge left to the jury the question whether the defendant had submitted to or acquiesced in the interruption for one year within the meaning of stat. 2 & 3 W. 4, c. 71, s. 4, and they said that he had not, and found for him on both pleas. Held, per Crompton, Blackburn, and Mellor, JJ.,

1. That the question was properly left to the jury, as an interruption might be shown to have been not submitted to or acquiesced in within the meaning of stat. 2 & 3 W. 4, c. 71, s. 4, though no suit or action had been brought.

2. That the declaration of W. was admissible as explanatory of acts about to be done by him, showing the nature of the enjoyment of the way.

3. *Semble*, per Crompton and Blackburn, JJ., that even taking H. L. as a stranger to the estate at the time of the conversation between him and S. and W., his declaration was admissible as part of the conversation.

WRIT issued 4th February 1868.

The first count of the declaration stated that the defendant broke and entered a garden of the plaintiff abutting on the east side thereof on a yard of the defendant, and broke a hole in the door of the garden, being the plaintiff's door, and trampled on the garden, and threw and placed bricks, mortar and rubbish in it.

The second count stated that the defendant broke down and destroyed a part of the wall of the plaintiff, being the wall at the west side of the defendant's yard and on the east side of the plaintiff's garden.

Pleas. First. Not guilty. Second. That the garden, door and wall were not the garden, door and wall of the plaintiff. Third. That one John Green was possessed of a cottage and yard with a privy standing and being upon the yard and adjoining to and abutting upon the garden of the plaintiff, and that the occupiers of the cottage, yard and privy for twenty years before this suit enjoyed as of right and without interruption the privilege of going from a certain public highway over the garden of the plaintiff to the privy and from the privy over the garden to the public highway, at all reasonable and proper times in that behalf, *3] for the purpose of removing *and carrying away from the privy the soil and refuse from time to time therein made and collected, for the more convenient occupation of the cottage, yard and privy, justifying the trespasses by the defendant as the servant of Green and by his command in the exercise of the said privilege. The fourth plea repeated the allegations in the third, substituting forty for twenty years. The fifth plea justified in the exercise of a right similar to that in the third plea granted in a conveyance of the cottage, yard and privy by Gabriel Fielding and Sir Henry Lawson, who were seised in fee of the garden and also of the cottage, yard and privy, to Thomas Walton in fee, which estate of Thomas Walton vested in the wife of the defendant. The sixth plea justified in the exercise of a similar right as a right of necessity under the conveyance mentioned in the fifth plea.

Replications. First. Issue on all the pleas. Second. To the third plea: that before the commencement of the period of twenty years in that plea mentioned, one Spedding, then being tenant for a term of years of the garden, gave license to one Thomas Walton, then being the occupier of the cottage, yard and privy, to enjoy and exercise the said privilege; and the exercise of the said privilege commenced before the beginning of the period of twenty years under and by virtue of the license and not otherwise; and that the enjoyment of the privilege continued from its commencement until and during the twenty years without any other title to or justification for the exercise of the same than the license so granted. Third. To the third plea: that the enjoyment of the privilege commenced before the beginning of the period of twenty years in that plea *4] mentioned, and that before and at the time of the commencement *of the enjoyment of the privilege, and from thence until and during part of the said period of twenty years, the garden was in the possession of one Spedding as tenant thereof for years to a certain other person being his landlord, the reversion thereof then belonging to the said landlord in fee; and that at the time of the commencement of

the enjoyment of the privilege, and from thence until and during the said part of the said period of twenty years, the same was so enjoyed without the knowledge or consent of the said reversioner, and without any grant of the privilege from the said reversioner or from any prior owner of the fee of the garden. The fourth replication to the third plea was the same as the third replication, except that it stated that the garden was in the possession of Spedding, first, as tenant for years to Sir Henry Lawson, who was seised as of fee of the reversion of and in the garden and who died so seised before the commencement of the twenty years, and after his death as tenant of the garden to Sir William Lawson, who was seised of the said reversion in fee simple from the time of the death of Sir Henry Lawson to the end of the tenancy of Spedding; and that, at the time of the commencement of the enjoyment of the privilege until and during the said part of the period of twenty years which elapsed during the tenancy of Spedding, the same was so enjoyed without the consent or knowledge of Sir Henry while he was reversioner, or of Sir William when he was reversioner, and without any grant of the privilege by any person having title to grant the same. Fifth. New assignment.

The defendant in his rejoinder joined issue on the second, third and fourth replications to the third plea.

There were pleadings to the new assignment, but it is unnecessary to set them out, as on the trial the jury *were discharged from finding [*5 any verdict under the new assignment.

At the trial, before Blackburn, J., at the Yorkshire Summer Assizes in 1863, the trespasses for which the action was brought were admitted. It appeared that the plaintiff was tenant to Sir William Lawson, Bart., of an inn called The Angel Inn, on one side of the street or highway in the village of Catterick in the North Riding, and a garden opposite to it on the other side. The defendant was owner of premises comprising a cottage and yard which had been formerly part of the Lawson estates, with a privy in the yard abutting upon the garden of the plaintiff: this privy had stood there for sixty years. At the beginning of that period, the garden was waste ground; it was first held with The Angel Inn, about the year 1811, as a coal yard, and between thirty and forty years ago it was converted into a garden, when a wall was built between it and the road. The wall had a door in it opening into the road. Sir John Lawson, Bart., who died in 1811, was lord of the manor of Catterick, and owner of extensive property including The Angel Inn and garden as well as the premises belonging to the defendant. He devised certain parts of his estates, including those premises, to Sir Henry Lawson, Bart., who succeeded him in the baronetcy and in the settled estates, in trust to sell. In pursuance of those trusts Sir Henry Lawson sold various lots, and Thomas Walton became a purchaser of a lot which included the site of the cottage in question, and the yard and privy. The deed of conveyance, which was dated the 22d September, 1812, did not give to the purchaser any right of way through the garden. In 1821 Walton built the cottage in question occupied by John Green. Walton died *in 1849, and the premises purchased by him [*6 from Sir Henry Lawson devolved on the defendant in right of his wife who was heiress of Walton.

There was evidence that before 1812 the tenants of the premises pur-

chased by the defendant cleaned out the privy, by leading the soil over the yard and garden and so into the road, and after the wall was built taking it through the door, obtaining the key of the door when it was locked from the tenant of The Angel Inn.

In May, 1823, Spedding became tenant of The Angel Inn and garden, and continued tenant until May, 1857. In 1830, he walled up stones against the opening of the privy into the garden and Mrs. Walton knocked them down. Mrs. Spedding complained of that act to Sir Henry Lawson, and at her request he went with Douthwaite, his agent, to look at the place, and met there Mrs. Spedding and Mr. and Mrs. Walton. A witness, who had occupied the cottage for thirty-five years, who was present on that occasion, was asked by the counsel for the defendant as to what Mrs. Walton and Sir Henry Lawson then said. This evidence was objected to by the counsel for the plaintiff, but the learned Judge held that it was relevant to the question whether the user of the way in question was of right, and therefore was admissible. The evidence was as follows. Mrs. Walton said to Sir Henry Lawson, "Is not this my right for the privy to be cleaned out?" Sir Henry Lawson said to Douthwaite, "I do not see how it can be cleaned out any other way than it has been." Douthwaite said, "I think something better than this can be done; there should be a wall built round to keep the soil in and prevent it oozing into the garden." Sir Henry Lawson then said to Mrs. Walton, "You must continue to clean the privy out the *7] same way through the *garden." The witness was cross-examined by the counsel for the plaintiff, who contended that he did not thereby waive his objection to the admissibility of the evidence. A low wall of about one foot high was accordingly built round, and a loose flagstone was put at the top so as to form a cesspool. And the privy was afterwards cleaned out through the garden as long as the witness remained tenant, that is until about 1852.

Under the will of Sir John Lawson, The Angel Inn and garden devolved upon Sir William Lawson, on his attaining the age of twenty-one years, in 1817. After the above conversation had been given in evidence, Sir William Lawson was called as a witness for the plaintiff, and proved that Sir Henry Lawson, who was his trustee and during his minority received the rents and had the general management of the property devised to him, continued by his request to receive them afterwards, he, Sir William, being non-resident in the county. Sir Henry died in 1834, and was succeeded in the settled estates and in the baronetcy by Sir William.

In October, 1861, the plaintiff, who was then occupier of The Angel Inn and garden, by direction of Sir William Lawson built a wall in the garden to prevent the soil from the privy being carried through the garden. The defendant complained to Sir William of this obstruction, and remonstrated against it, and the matter was placed in the hands of their respective attorneys. A correspondence between them, in which there was a negotiation as to the alleged right being referred to arbitration, began on the 28th December, 1861, and continued until the 13th February, 1862; when it ended without any result. Afterwards the defendant made further remonstrances against the existence of the ob- *8] struction, *and made several attempts to remove it, in which he was frustrated by the plaintiff, until the 8d February, 1863, when he committed the acts for which the action was brought.

It was contended for the plaintiff that, assuming there was evidence of a user as of right either for forty years or twenty years, there had been an interruption of the enjoyment, and that interruption had been acquiesced in by the defendant for one year after the wall was built, inasmuch as the writ was sued out more than a year after the building of the wall. The learned Judge, in summing up to the jury, told them that as to the user it must be of right, that is, by persons asserting their right openly and not craftily; but that it was not necessary that notice of the user should have come to the personal knowledge of Sir William Lawson; and he left it to them to say whether the user had been for twenty years from the commencement of it, as of right, or for forty years. That as to the question of acquiescence in the interruption, it turned upon the correspondence between the attorneys on both sides, and he asked them as a matter of fact whether the defendant had submitted to or acquiesced in the interruption when he was negotiating with the party who caused the interruption.

The jury found that the way was used as of right for forty years, and that it had not been interrupted for one year; and a verdict was entered for the defendant on the issues joined on the third and fourth pleas, and for the plaintiff on all the others.

In Michaelmas Term, *Temple* obtained a rule for a new trial, on the ground of misdirection by the learned Judge in telling the jury that there was evidence of a *sufficient user to comply with the statute; [*9 in not directing the jury that there was an interruption acquiesced in for a year within the meaning of the statute; and also on the ground of improper admission of evidence.

Price and *Kemplay* showed cause.—First. Under stat. 2 & 3 W. 4, c. 71, ss. 1, 2, 3, certain rights are acquired when they “have been actually enjoyed” “without interruption” for the periods therein mentioned; and sect. 4 puts a construction upon the phrase “without interruption:” it enacts that each of the periods before mentioned “shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.” It is a question of fact for the jury whether there has been an interruption of the enjoyment; it must also be a question of fact whether the interruption was submitted to or acquiesced in for a year. There are no words in sect. 4 to support the notion that the only mode in which a person can show that he does not acquiesce in an interruption is by bringing an action. Suppose the question of right had been referred to arbitration and decided in favour of the claimant, that would be evidence of non-acquiescence. Here, though the defendant did not assert his right by abating the obstruction within a *year, he did [*10 not submit to or acquiesce in the interruption, for he put the matter into the hands of his attorney. In *Flight v. Thomas*, 8 Cl. & F. 231 (E. C. L. R. vol. 39), (a) it was held that the interruption may be at the beginning, middle, or end of the period. Suppose an interruption occurred in the middle of the period, and at the end of the period the

(a) Affirming the judgment of the Exch. Ch. 11 A. & H. 688.

owner of the land over which the right was claimed acknowledged the right, and then the claimant was allowed to enjoy it, could it be contended that the interruption had been submitted to or acquiesced in because no action had been brought? When a person ceases to use a right during a part of the period it is a question for the jury whether there has been a continued enjoyment of the right during that period: *Carr v. Foster*, 3 Q. B. 581 (E. C. L. R. vol. 43). [CROMPTON, J.—A man cannot be always actually enjoying a right of way. But suppose he agreed not to use it, would there still be an enjoyment of it without interruption?] It would be a question for the jury. If during twenty years the parties were continually squabbling about the right, there would not be a user without interruption. In order that the enjoyment of an easement may confer a right it must have been open, peaceable and as of right, “*nec vi nec clam nec precario*.” Gale on Easements, 8d ed., by Willes, p. 179. *Cooper v. Hubbuck*, 12 C. B. N. S. 456 (E. C. L. R. vol. 104), following *Ward v. Robins*, 15 M. & W. 237, only decides that the period of twenty years which gives the right is the period next before the commencement of any suit or action wherein the claim to the right is brought into question: Willes, J., there said, pp. 469–470, *11] “Moreover, in cases where, pending a *lawsuit the enjoyment is suspended or so contested as to lose the character of an enjoyment as of right, the claimant, according to the construction which I reject, would lose all benefit of the statute, if his suit or action should raise any question which rendered an appeal necessary, so as to prolong the litigation for a year. This result seems to call for an astute construction, if necessary, to exclude it, rather than for an astute construction to bring it about.”

Secondly. Assuming that, as the evidence stood when the conversation between Sir Henry Lawson and Mrs. Walton took place, Sir Henry Lawson was a stranger to the estate over which the right was claimed, that conversation was admissible to show that the user of the way did not commence by license from Spedding, but was exercised as of right. [CROMPTON, J.—The declarations of Spedding, the tenant of Sir Henry Lawson, would not affect his landlord. BLACKBURN, J.—There was a contention on one side that all the acts of user done were under a license from Spedding, and I thought that the conversation was relevant to that issue.] The subsequent evidence connected Sir Henry Lawson with the estate. Also the right which the jury have found is a right by enjoyment for forty years: with reference to that it is immaterial whether the owner of The Angel Inn and garden had knowledge of the user; but it is not immaterial whether the user was secret or known. Under sect. 2 of stat. 2 & 3 W. 4, c. 71, if the user has been only for twenty years the claim may be defeated by showing that the owner of the servient tenement never knew of the exercise of the right: otherwise, if the user has been for forty years: Gale on Easements, 8d ed., by Willes, p. 148, note (b).

*12] ** Temple and T. Jones* (Northern Circuit), *contra*.—First. Where a party, instead of proving immemorial user, relies on stat. 2 & 3 W. 4, c. 71, under which rights are acquired by uninterrupted enjoyment for certain periods, if the enjoyment is interrupted he has no right until an action is brought for the interruption. The right is inchoate, but does not become absolute until a writ is issued, and if no action is

brought within a year after the interrupted party has notice of the interruption the right is gone. The legislature intended that there should be a suit or action on one side or the other. The period of enjoyment necessary to confer a right must run on to the time of bringing an action, *Ward v. Robins*, 15 M. & W. 237; and therefore the non-acquiescence in an interruption must be asserted by bringing an action. In that case Parke, B., in delivering the judgment of the court, pp. 242-3, adverted to the apparent absurdity arising from a strict construction of sect. 4 as having been fully considered in *Wright v. Williams*, 1 M. & W. 77, 98, and added that the decision in that case was fully approved of and acted upon by this court in *Richards v. Fry*, 3 N. & P. 67.(a) The decision in *Flight v. Thomas*, 8 Cl. & F. 281, is not inconsistent with this. [CROMPTON, J.—Suppose a wall built to obstruct a user, and in the middle of the year the claimant knocks it down, but does not bring an action within a year, could it be said that he acquiesced in the obstruction? BLACKBURN, J.—Or suppose the claimant were prevented by force from knocking the wall down.] *Cooper v. Hubbuck*, 12 C. B. N. S. 456 (E. C. L. R. vol. 104), indirectly established the affirmative, though the court was divided *on the point whether the twenty [*13 years uninterrupted enjoyment which is to confer the right under sect. 3 must be for the period of twenty years next before the pending action, or whether it may be the period of twenty years next before another action brought at some former period, wherein the claim to the right was brought in question. Williams J., said, p. 475, "It was established by the case of *Ward v. Robins*, 15 M. & W. 237, not only that a title *under the act* cannot arise unless some action is brought," that is after an interruption, "but also, that, however long and continual the enjoyment of the right may have been up to the time of the grievance complained of, the title gained thereby under the act is only inchoate, and is not completed but by enjoyment continued up to the commencement of the suit."

Secondly. Evidence of what Sir Henry Lawson said during the conversation between Mrs. Walton and Mrs. Spedding was not admissible, and if it were it could not affect Sir William Lawson, under whom the plaintiff holds. [BLACKBURN, J.—Sir Henry Lawson must be taken to have been a stranger to the estate at the time of the conversation; and I admitted the evidence assuming him to be such. MELLOR, J.—No weight ought to be allowed to what Sir Henry said, as an admission of right against Sir William.] Neither was the declaration of Mrs. Walton admissible as a declaration accompanying an act done. In many cases it may be difficult to draw the line; but here, at any rate, the declaration was too remote from the act. [BLACKBURN, J.—There had been time for Sir Henry to make an appointment for his steward to meet him at the place, and therefore the declaration of Mrs. Walton was not contemporaneous *with the act done. CROMPTON, J.— [*14 But it is put as explanatory of the act done by Mrs. Walton and as evidence of a threat which she afterwards carried out.] Even if her declaration is admissible, it does not make what Sir Henry Lawson said admissible. [MELLOR, J.—If part of a conversation is admissible, can what was said upon the subject of it at the same time by some one else

(a) Also reported 7 A. & E. 698.

be excluded? Is the judge to stop the conversation in the middle?]
Yes. If the latter part of it does not hang upon the former.

CROMPTON, J.—As to the point on the improper reception of evidence. I have had some doubt whether the conversation in question was more than talk between Mrs. Walton and the tenant of the garden, in the presence of a stranger, which of course would not affect the landlord; and though at a later stage of the trial Sir Henry Lawson appeared sufficiently connected with the title to the garden to make the conversation admissible, I think as at present advised that would not cure the objection. It is said that as the counsel for the plaintiff went on and supplied the evidence which was wanting to connect Sir Henry Lawson with the title, and the whole was left to the jury, the defect was cured; but that is not so in the case of evidence which is objected to as inadmissible; for the admission of it might alter the whole course of the trial, and compel the opposite party to call witnesses whom he otherwise would not have called. Therefore I do not rely on Sir Henry Lawson being connected with the title of the present owner: I treat him as a stranger, as my brother Blackburn did at the trial. Then it is clear that the declaration of Mrs. Walton was not part of the trans-
*15] action. It is said *to be evidence in two ways, first, as explaining her conduct; secondly, as showing that the act was not done under a license from Spedding. The latter is the strongest way of putting it in favour of its admissibility. For, the question being raised whether the user of the way was with the permission of Spedding, Mrs. Walton comes and says, I claim to use the way as of right, and says so in the presence of Mrs. Spedding: that negatives that at that time she used the way by the license of Mrs. Spedding. Then she threatens to do the act which she afterwards did, and the declaration is at all events admissible as explanatory of her future acts, that she was claiming to do them as of right. Consequently, the talk between Mrs. Walton and Mrs. Spedding was evidence. It follows that the other parts of the conversation which ensued, though they include the declaration of a third party, are admissible. The declaration of Sir H. Lawson becomes more important by reason of his being afterwards shown connected with the estate: morally it would have great weight; but we are only considering the question of law, whether it is admissible.

The more important question is whether there has been a non-acquiescence by the defendant in the interruption of his easement. That depends on sect. 4 of stat. 2 & 3 W. 4, c. 71, and upon reading the words of that section I have no doubt that this was a matter for the jury and not one on which the Judge would have been authorized to stop the case. It was argued by Mr. *Temple* and Mr. *Jones* that there was acquiescence unless some suit or action was brought for the act or other matter which constituted the interruption. But there is nothing in the statute to warrant that construction and their argument has not convinced me that it is right. They lay down as the ground of their
*16] argument, what *indeed must now be taken to be law, that the party claiming the right must show that it has been enjoyed continuously up to the time of the commencement of the suit or action. One would have thought that for justifying an alleged trespass it would be necessary to show a right to do the act at the time of committing it. And the notion of an inchoate right being perfected at the time of the

commencement of the action is very strange; probably it was suggested by the words in the first clause of sect. 4,—each of the periods shall be deemed to be the period “next before some suit or action” wherein the claim shall be brought into question.

There is great force in what Mr. *Kemplay* says, that the provision as to acquiescence or non-acquiescence applies not only at the end of the period but also at the beginning and the middle of it; and if it had occurred in the middle of the period we should look at all the facts in order to determine whether there had been acquiescence or non-acquiescence without reference to any suit or action having been brought.

It does not follow from what is established by the cases that, where an interruption takes place at the end of the period, the non-acquiescence in the interruption can only be shown by a suit or action having been brought. According to the plain and ordinary sense of the words the question is whether the interruption has been really submitted to. Suppose a man is assaulted, it might be shown that he has not submitted to or acquiesced in the assault, though he had not brought an action for it. In the construction of the first clause in sect. 4 of stat. 2 & 3 W. 4, c. 71, an apparent absurdity, to use the language of Parke, B., in *Ward v. Robins*, 15 M. & W. 237, 242, has been rendered necessary by the *wording of that section; but we should extend that [*17 absurdity to the latter clause of the section, without any necessity for doing so, if we adopted the construction contended for by the plaintiff.

I am therefore of opinion that the question of submission to, or acquiescence in, an interruption is to be left to the jury, and the present case was properly left to them.

MELLOR, J.—I agree with my brother Crompton in the construction of stat. 2 & 3 W. 4, c. 71, s. 4. The learned Judge who delivered the judgment of the Court in *Ward v. Robins*, felt the apparent absurdity into which the Court was driven by force of the earlier words of the section; and certainly it does not follow from that case that, in construing the time during which an interruption is to be submitted to or acquiesced in, we should adopt a similar apparent absurdity to which we are not driven by the latter words of the section. When a statute for shortening the time of prescription, after, in aid of that attempt, prescribing the period during which the right must be enjoyed without interruption, goes on to say that no act or other matter shall be deemed to be an interruption unless “submitted to or acquiesced in for one year” after the party interrupted shall have notice thereof, the natural and obvious meaning of the words is that an obstruction shall not be effectual unless the party shall allow it to continue for one year, without any act on his part to show that he resists it. In the present case correspondence and negotiation upon the matter show that the question was [*18 *more properly a question for the jury than the Judge; and the jury were warranted in finding that the interruption was not submitted to, or acquiesced in, for a year, within the meaning of the statute.

I have felt a difficulty as to the admissibility of some part of the evidence, though not on the declaration of Mrs. Walton. The question is, what was the nature of the enjoyment of the way through the garden? The evidence of it consists of facts extending over a long period of time. Mrs. Walton’s declaration was explanatory of preceding acts, showing

the nature of the enjoyment, and may be admissible as such ; and when she said that she was going to do some act, her declaration certainly would be admissible of the character of that act.

BLACKBURN, J.—I am of opinion that the course taken at the trial as to both points was right.

The first point turns on the construction of the 2d and 4th sections of the Prescription Act, 2 & 3 W. 4, c. 71. Where a claim of an easement is made by reason of its having been enjoyed for twenty or forty years three things must concur:—First. An enjoyment by a person claiming right thereto ; Secondly. An enjoyment without interruption ; and, Thirdly. It must have been an enjoyment for the full period of twenty or forty years. On the construction of the first clause in sect. 4, Mr. *Temple* and Mr. *Jones* say the cases have decided that the period of enjoyment must expire at the commencement of some suit or action ; and we cannot help that apparent absurdity, because the words of the Act are express. But, construing the words of the second clause in *19] that section according to their plain meaning, I am unable to see how it follows that an interruption is acquiesced in for a year unless a suit or action be brought within that time. In the present case I thought that there was not an acquiescence in the obstruction during the time of the correspondence between the attorneys of the parties, but I left the question to the jury, and they found that there was not. Excluding that time the obstruction was not submitted to, or acquiesced in, for one year, whether we reckon the time to the act of the alleged trespass or to the issuing of the writ ; though I think that, if the question arose, it would turn rather upon when the act was done than upon when the writ issued. Therefore on that point I think the direction was right, and the finding of the jury right.

As to the other point. The defendant is claiming a right of way by reason of user for more than forty years. From the time of the purchase of the property down to the erection of the wall the right was de facto enjoyed, though the occupier of the cottage occasionally asked Spedding for the key of the garden-door. Also, Spedding had blocked up the hole ; but still there was a user of the right after that. On the knocking down of the wall by Mrs. Walton a discussion took place in the presence of Sir Henry Lawson, who was not then shown to be connected with the title to the garden, and therefore is to be taken as a stranger. I think with my brother Mellor that her declaration would be admissible to show what was the nature of the enjoyment before that time ; but I do not doubt it was admissible to show that the subsequent *20] enjoyment was of right. It is important that the act of user is done openly, as the civil law says, “ nec vi nec clam nec precario.” But I did not say that Sir Henry Lawson by his admission could give the right of way.

T. Jones applied for leave to appeal.

PER CURIAM.—We have no doubt upon the construction of the statute ; and we think it is not a case for appeal.

Rule discharged.

PUST v. DOWIE. Feb. 8.

Charter-party.—Condition precedent.—Cargo.—“Weight and measurement.”—Damages.

Declaration on a charter-party made at Liverpool between the plaintiff, the master of a Prussian vessel, guaranteed 577 tons English, and the defendant, as freighter or charterer, whereby it was agreed that the ship should take on board a full and complete cargo and proceed to Sydney, and deliver it there agreeably to bills of lading, in consideration whereof the affreighter should deliver the cargo to be loaded on board, &c., and should pay for the use and hire of the vessel in respect of the voyage, 1550*l.* in full, “on condition of her taking a cargo of not less than 1000 tons of weight and measurement,” payment to be made as follows: viz., the captain to receive the freight payable abroad as per bills of lading, &c., and the balance to be paid in cash on sailing, less three months’ interest; and that such goods only as the charterer might direct should be received on board, for which the mate should give a receipt and measure when tendered alongside, as well as for weight of coals when weighed into the vessel. Breach, that the defendant made default in loading the ship with a cargo as agreed, and did not pay the balance of 1550*l.* over and above the freight payable abroad as per bills of lading. Pleas. First, that the defendant did not make default in loading the ship with cargo as agreed. Third, that the ship did not nor could take a cargo of not less than 1000 tons pursuant to the condition. At the trial it appeared that the action was brought to recover the balance of freight payable in advance. The defendant had loaded the ship deep enough for her voyage with 855 tons, in the following proportions: weight goods 525, measurement goods 330; but she had still an unoccupied space for 160 tons of measurement goods. In order to load a vessel with as full a cargo as she could reasonably and practically carry, it was usual, according to Lloyd’s rule and the custom generally adhered to at the port of Liverpool, to load her with one-third weight goods and two-thirds measurement goods. Some evidence was given of a usage that in a Sydney cargo the proportion was two-thirds weight and one-third measurement. The jury found that, assuming the vessel to be loaded with ordinary weight and measurement goods, the capacity of the ship was 1000 tons. Held, by the Exchequer Chamber, affirming the judgment of the Queen’s Bench,

1. That the condition meant that the ship was capable of taking a cargo of 1000 tons of weight and measurement in the ordinary proportion at the port of loading, and therefore was fulfilled.

2. That this was not a condition precedent; and, if it were, the defendant could not plead it in bar, having received a substantial part of the consideration for his promise.

3. Concessum. That the breach that the defendant made default in loading the ship with a cargo as agreed, could not be sustained.

4. *Quære*, if the ship had fallen short of the capacity of 1000 tons weight and measurement in the ordinary proportion, whether advantage could be taken of it in reduction of damages?

THE declaration was on the following charter-party between the plaintiff and the defendant: “Memorandum for charter, Liverpool, 30th July, 1862. It is this day agreed between Captain Pust, of the good ship or vessel called the *Der West*, guaranteed 577 tons English, 3/3 *Veritas*, whereof he is master, of the one part, and James Dowie, Esq., freighter or charterer of the said vessel, of the other part: Witnesseth that it is agreed that sufficient room for the cable, ship’s stores, provisions, water, captain, officers and crew throughout this charter-party being excepted, reserving however such room only for that purpose as the owners would were the ship to be loaded for their exclusive benefit, the said vessel shall immediately be made ready, and receive and take on board from the said charterer, who is to have the full reach of the vessel’s hold from bulkhead to bulkhead, a full and complete cargo of lawful merchandise, specie, gunpowder, and on deck the short number of steerage passengers, if necessary, the owners employing sufficient hands for that purpose; and thereupon, on being despatched, shall proceed to Sydney, N. S. W., and there deliver the said cargo in the usual and customary manner, agreeably to bills of *lading, and so end the voyage; in consideration whereof the said af- [*22

freighter shall deliver alongside the cargo to be loaded on board the said vessel, and shall receive, or cause the same to be received, at her port of discharge in the usual and customary manner, and shall and will pay for the use and hire of the said vessel, in respect of the said voyage, the sum of 1550*l.* in full, on condition of her taking a cargo of not less than 1000 tons of weight and measurement, payment to be made as follows, viz., the captain to receive the freight payable abroad as per bills of lading, or an order handed over to him by the charterer at the current rate of exchange, and the balance to be paid in cash on sailing, less three months interest. . . . And that such goods only as the charterer may direct shall be received on board the said vessel, for which the mate shall give a receipt and measure when tendered alongside, as well as for weight of coals when weighed into the vessel; and no goods to be received in the cabin or any part of the vessel without the consent of the charterer. That the master shall, at the charterer's request, sign bills of lading for any rate of freight that may be filled in and made payable in any manner the charterer may choose, without prejudice to this charter, and that he shall attend at the broker's office at least once each day after the loading shall commence, for the purpose of signing such bills of lading. That the vessel shall be consigned to the charterer's agent at the port of discharge, the owners paying the customary commission on freight payable abroad as per manifest. . . . The captain to have an absolute lien and charge for freight on the cargo, and to have no recourse on the charterer for any freight due abroad for bills of lading if not *paid.

*23] And lastly, for the due performance of the agreement and matters herein contained, each of the said parties bindeth himself and themselves to the other in the sum of 1550*l.* As witness the hands," &c. The declaration then averred that all things necessary to make the charter-party a complete and binding agreement between the plaintiff and the defendant happened and were fulfilled; and that all the conditions were performed and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action for the several breaches of contract after mentioned: Yet the defendant made default in loading the ship with a cargo as agreed, and did not pay the plaintiff the balance of the sum of 1550*l.* in the charter-party mentioned over and above the freight payable abroad as per bills of lading, and which, in the whole, amounted to a sum less than the sum of 1550*l.* There was also a claim for demurrage.

Pleas. First. To the alleged default in loading the cargo as agreed, that the defendant did not make default. Second. To the same, that the plaintiff was not ready or willing to receive or take the cargo as agreed, nor was the vessel ready or able to receive or take on board the same as agreed, and that the default was occasioned by the acts and defaults of the plaintiff, and not by or through the defendant. Third. To the non-payment of the balance of the sum of 1550*l.*, that the vessel did not nor could take a cargo of not less than 1000 tons of weight and measurement pursuant to the condition. Fourth. To the same, payment before action. Fifth. To the claim for demurrage, set-off.

Issues joined upon all the pleas.

*24] *Demurrer, to the third plea as no bar to the claim to which it was pleaded, it not being a condition precedent to such claim

that the vessel could and did take a cargo of not less than 1000 tons of weight and measurement.

Joinder in demurrer.

This demurrer was argued, in Easter Term, 1863, April 28th, before COCKBURN, C. J., CROMPTON, BLACKBURN and MELLOR, JJ.

Kemplay, in support of the demurrer, cited *Pordage v. Cole*, 1 Wms. Saund. 319 l, and note (4) 320 a, 6th ed., and the cases there referred to, and *Cutter v. Powell*, 2 Smith L. C. 1, and note, p. 13, 5th ed. [CROMPTON, J., referred to *Behn v. Burness*, in error, 8 B. & S. 751 (E. C. L. R. vol. 113), and BLACKBURN, J., to *Graves v. Legg*, 9 Exch. 709, 716, per Parke, B.]

No counsel appeared for the defendant, and the Court held that in accordance with the principle laid down in *Behn v. Burness*, in error, and *Graves v. Legg*, the words in question did not constitute a condition precedent, so as to justify the defendant in repudiating the contract after he had received the chief part of the consideration for it, and gave judgment for the plaintiff.

On the trial, before Blackburn, J., at the Liverpool Summer Assizes in 1863, it appeared that the action was brought by the plaintiff, a native of Prussia and the master of the Prussian vessel *Der West*, against the defendant as freighter and charterer of that vessel, to recover (amongst other claims not material to this case) the sum of 219*l.* 12*s.*, the balance of 1550*l.* payable in cash, less three months' interest, on the vessel sailing from Liverpool for Sydney; the residue being payable *in Sydney upon the terms contained in the charter-party. The following admissions were made by both parties, [*25 namely, the original charter-party of the ship *Der West*, and a copy of the ship's manifest, that such manifest contained a description of the goods loaded on board the ship by the defendant, and that with the cargo mentioned in the manifest the ship was fully deep enough for her intended voyage. The following is the description in the manifest of the goods loaded on board the vessel:—

	Tons.
Weight goods,	525
Measurement goods,	830
	<hr/> 855 <hr/>

Evidence was given on the part of the plaintiff that when the ship *Der West* sailed with the cargo on board, she had unoccupied space in her hold sufficient for 160 tons of measurement goods; that, in order to load a vessel with as full a cargo as she could reasonably and practically carry, it was usual, according to Lloyd's rule, and the custom generally adhered to at the port of Liverpool, to load her with one-third weight goods and two-thirds measurement goods; and that if the ship *Der West* had been so loaded with ordinary weight and measurement goods she would have carried 1000 tons weight and measurement. The plaintiff's witnesses were cross-examined as to the existence of a usage with reference to Sydney cargoes being two-thirds weight and one-third measurement, but they thought there was no difference between ships to Sydney and elsewhere.

The following witnesses were examined for the defence.

Joseph Taylor stated that he was manager for the *defendant, [*26

and that it was part of his duty to measure ships taken by him; that in July 1862 he measured the ship *Der West* before she was chartered by the defendant, and that she had a capacity of 806½ tons measurement; that she saw the cargo put on board, and that the defendant had more cargo to put on board if the vessel could have taken more; that she was loaded below her mark; that according to his experience a general ship bound to Sydney had two-thirds weight and one-third measurement; that he had been acquainted with Sydney ships in particular for seven years; that the usual cargo to Sydney was salt, slates, occasionally beer, crates of earthenware, and such rough stuff, very few fine goods went from Liverpool; that there was generally more weight than measurement; and that with a Sydney cargo of two-thirds weight and one-third measurement the ship *Der West* could not carry 1000 tons. On cross-examination, he stated that he informed the defendant of the measurement; that the plaintiff resolved to guarantee 1000 tons; that one ton of ordinary average dead weight iron or slates is about half the bulk of measurement goods, and salt, which is weight, measures forty-five feet to the ton; and that the vessel would only carry about 900 tons with one-third of Sydney weight goods, and with the rest filled up with crates and very light goods.

William Grace, manifest clerk to Messrs. J. Thompson & Co., who are largely engaged in the Australian trade, stated that they despatch vessels to Sydney about once a month; that two-thirds weight and one-third measurement is the usual cargo, and that the weight goods are *27] generally salt and slates, very little iron and very few *fine goods go out; that the proportion of weight goods is greater than the measurement. On cross-examination, he stated that the measurement goods were beer in bulk, beer in bottles, crates of earthenware, and other general goods; that Sydney cargoes varied a good deal; that there was never so little as one-third weight, but sometimes half and half; that he thought the Sydney trade differed from others; that his experience was confined to the Sydney trade; that Thompson & Co. are loading brokers; that he spoke of both general and chartered vessels; that he saw to the loading on behalf of the owners generally.

Robert Bruce Steele, clerk to James Bains & Co., Australian merchants, stated that he had a knowledge of the manifests of ships for Sydney; that for a Sydney ship the proportion of cargo is about two-thirds weight; that more weight goods go than measurement goods, and that scarcely any measurement goods go to Sydney.

James Dowie, the defendant, stated that he was principally engaged in shipping to Sydney for many years; that in many cases vessels for Sydney had to take more weight goods, including salt, than measurement goods; that this is the ordinary case with Sydney cargoes, and that very often he had to take two-thirds weight and one-third measurement; that looking at the average weight of Sydney goods, this vessel even at one-third weight would not carry 1000 tons; that on the average three tons measurement were equal to two tons weight; that the weight goods are chiefly salt, slates to a considerable extent, and very little iron, and occasionally the great bulk of measurement goods from Liverpool to Sydney is beer, which is nearly as heavy as salt, crates to a *28] considerable extent, and many sundries, *no bales or cases; that in an average cargo weight exceeds measurement in the ratio of

two to one. On cross-examination, he stated that he knew the measurement at the time of the charter, and that it was impossible the vessel could carry 1000 tons, and that he told both the captain and the broker so.

The learned Judge, in summing up, left it to the jury to say what was the capacity of the ship, first, on the supposition of her being loaded with ordinary weight and measurement goods, the weight and measurement being proportioned as a person desirous of loading as full a cargo of ordinary weight and measurement goods as she was capable of carrying would load her; and secondly, on the supposition of her being so loaded with Sydney weight and measurement goods: and if in either view her capacity fell short of 1000 tons, he directed them to find how much the ship was worth less than if she had been able to carry 1000 tons, and that should be deducted from the 1550*l*.

The jury found that the capacity of the vessel in the first view proposed to them was 1000 tons, and in the second view 855 tons, and that in the latter view 224*l*. 15*s*. was the sum which should be deducted from the 1550*l*., being at the rate of 31*s*. per ton for 145 tons, the difference between 855 tons and 1000 tons.

The learned Judge being of opinion that the first view was the right one, directed a verdict to be entered for the plaintiff for the amount claimed, and gave leave to move to enter a verdict for the defendant in accordance with the second finding.

In Michaelmas Term, *Edward James* obtained a rule accordingly, on the ground that, on the true construction *of the contract and the finding of the jury, the defendant was entitled to a verdict; or [*29 for a new trial, on the ground of misdirection, the defendant having, on the true construction of the contract, a right to put such lawful cargo on board as he pleased, and having loaded a full and complete cargo of lawful merchandise, his liability was not enlarged by the agreement or warranty on the part of the plaintiff that the ship should carry 1000 tons of such lawful cargo.

Mellish and *Kemplay* showed cause.—The object of specifying weight and measurement in the condition as to the capacity of the vessel is that the hold may be full when she sinks to the depth of the water-mark. There is no absolute rule of capacity of a ship, it must depend on the weight and measurement of the goods put on board. [BLACKBURN, J.—A vessel would not be seaworthy if loaded with goods either by weight or measurement exclusively.] The condition in this charter-party is a general warranty of the capacity of the ship according to the ordinary mode of loading a general ship. [BLACKBURN, J.—Sometimes the charter-party is for time, without mentioning a port of discharge. This charter-party expresses that the ship is chartered for a voyage to Sydney.] But there is no warranty of what the ship would carry on that voyage, nor a stipulation that a Sydney cargo was to be put on board. There was no evidence that the master of the ship, who was a foreigner, had any knowledge of a custom in the trade to Sydney, nor was there sufficient evidence of a custom which could put on the words of the charter-party a construction different from the ordinary one. [BLACKBURN, J.—*The law on this point would be the same as in the case of an English shipowner. Suppose a contract to load a full [*30 and complete cargo.] That would be construed according to the cus-

tom of the port of loading. In *Machlachan on Merchant Shipping*, p. 877, it is said, "When he charters the whole ship under contract to provide a full and complete cargo, he is bound to load a full cargo, although the vessel is larger than the representation made of her capacity in the charter-party; provided such excess is not unreasonable." [He also cited *Cockburn v. Alexander*, 6 C. B. 791 (E. C. L. R. 60.)]

The first breach was inserted *ex majori cautela*, but is not relied upon.

Baylis, in support of the rule.—This charter-party, which is peculiar, being for a lump sum, and the balance of freight being payable in advance instead of when earned, and under the condition that the ship shall carry 1000 tons of weight and measurement, the freighter may put on board any proportions of weight and measurement he chooses, and therefore is not liable on either breach. The owner of the vessel ought to know what the capacity of his vessel is. [BLACKBURN, J.—And the charterer ought to know what cargo he wants to put on board.] [He cited *Moorsom v. Page*, 4 Camp. 103, and *Cuthbert v. Cumming*, on appeal, 11 Exch. 405.]

BLACKBURN, J.—The point raised in this case is one of nicety, but it lies in a very small compass, depending on the construction of the *31] charter-party, and is not capable *of being much elucidated by argument. And I do not think we shall gain any advantage by taking time to consider.

The question is, by what rule is the condition or warranty of taking a cargo of not less than a specified number of tons of weight and measurement to be determined. The parties make a charter-party for a ship at Liverpool to go to Sydney, with a cargo to be put on board at Liverpool; a lump sum of 1550*l.* is to be paid for the voyage, and the freighter says to the shipowner, I will only pay that sum on condition that you warrant the ship of such a burden that she will take a cargo of not less than 1000 tons of weight and measurement; and the shipowner says, my ship is capable of taking 1000 tons of weight and measurement. Mr. *James*, on moving for the rule, and Mr. *Baylis*, in supporting it, have contended that there is a warranty that the ship is capable of taking 1000 tons of goods in any proportion of weight and measurement which the freighter chooses to furnish. But that cannot be, for it would put the shipowner at the mercy of the freighter. When a ship is loaded, three things are to be considered: the ship is to be full, it is to be loaded so that it may sink to a proper depth, viz., that of the water line, and so that the centre of gravity may be in the proper place, in order that the ship may not roll or labour, or be top-heavy. These objects can only be secured by certain proportions of heavy and light goods being loaded on board. And therefore the parties must be taken to have intended that the capacity of the ship should be to take 1000 tons weight and measurement in reasonable proportions.

*32] *Then are the proportions to be reasonable with reference to ordinary goods generally, or with reference only to goods usually shipped for Sydney? I think the parties must have meant that the capacity of the ship should be measured with reference to ordinary weight and measurement goods. When a shipowner says, "My ship will carry 1000 tons of weight and measurement, you may take her to such a port and put on board of her what goods you please for the market there,"

I think that means that the ship is of capacity to hold 1000 tons of weight and measurement goods, furnished in fair proportions of the ordinary and usual goods of the port of loading. The jury found that assuming the ship was loaded with ordinary weight and measurement goods, the weight and measurement being proportioned as a person desirous of loading as full a cargo of ordinary weight and measurement goods as she was capable of carrying would load her, the capacity of the ship was 1000 tons. On that finding the condition was complied with and the plaintiff is right. The rule, therefore, will be discharged.

This finding precludes any question whether, if the ship fell short of that capacity, advantage could be taken of it in reduction of damages.

MELLOR, J.—I agree that this case would not be elucidated by further consideration, nor by reference to authorities; because the cases as to loading a full and complete cargo depend upon other considerations than those which govern this. By this charter-party a ship is hired for a certain voyage, viz., from Liverpool to Sydney, for the sum of 1550*l.* in full, in condition of *her taking a cargo of not less than 1000 tons of goods weight and measurement. I think the [*33 latter words are introduced as a test of the general capacity of the ship and not with reference to the goods being carried to any particular port. I think the plaintiff is not to be bound by the measurement, or amount, or quantity of the goods, as if the warranty had been merely for Sydney goods; but that, the ship being of the capacity warranted, it is the default of the defendant that having the option of loading her as he chooses he has not made the ship fully available.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

PUST *v.* DOWIE. Feb. 4, 1865.

For head-note, see ante, p. 20.

THE defendant brought error on the judgment of the Court of Queen's Bench on the demurrer, and appealed from its decision in discharging the rule. The case was argued by

Baylis, for the defendant.—There are two questions on the construction of the charter-party, both raised by the third plea; one arising on the demurrer, the other on the facts proved at the trial.

First. As to the rule. The charter-party stipulates *for payment of freight in advance, on condition of the vessel taking a cargo of not less than 1000 tons by weight and measurement. The charter-party contains no restriction as to the kind of cargo to be put on board, and states that such goods only as the charterer may direct shall be received on board, and, therefore, the charterer may put on board any cargo of lawful merchandise and in what proportions of weight and measurement he pleases, provided he puts on board some goods by measurement. If the defendant put on board an exceptional cargo, as a cargo of feathers, he must pay by measurement. [*Mellish*, contra.—The plaintiff does not rely on the breach that the defendant did not load a proper cargo.] In *Moorsom v. Page*, 4 Camp. 103, it was held that a

charterer who shipped a full cargo, consisting of two out of three enumerated articles, fulfilled his contract. In most of the cases there has been a different freight for different kinds of goods, and the Courts have classified the freight accordingly, as in *Cockburn v. Alexander*, 6 C. B. 791 (E. C. L. R. vol. 60), where Maule, J., in effect adopting the rule of construction, *verba fortius accipiuntur contra proferentem*, said, p. 814, "Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant." In *Maclachan on Merchant Shipping*, p. 378, it is said, "The description of the cargo stipulated for in the charter-party is often so loose as to leave the shipper his choice of goods in the whole range of lawful *35] merchandise; but it is also occasionally so connected *with the rates of freight and the whole earnings of the ship by the adventure, as to bind the merchant in the strictest manner, if not to ship accordingly, at all events to pay as though he had."

When the charterer charters a ship to carry a cargo to a particular place, if the charter-party is silent about the merchandise to be carried it will have reference to the place of destination. If the 1000 tons are construed to be half weight and half measurement, the defendant only put on board twenty-five tons more than half weight. But the proper construction is that there should be a reasonable proportion of weight and measurement, bearing in mind that a usual Sydney cargo is two-thirds weight and one-third measurement. Evidence is admissible to show the usual proportions of weight and measurement in loading a cargo destined for a particular port: *Cuthbert v. Cumming*, on appeal, 11 Exch. 405.

Secondly. As to the demurrer. The owner does not guarantee the vessel to measure more than 577 tons; but the shipper is not to pay the balance of freight in advance unless the ship will carry 1000 tons of weight and measurement. The court must give full effect to the terms which have been agreed upon between the parties: *Stadhard v. Lee*, 3 B. & S. 364, 371-2 (E. C. L. R. vol. 113); *Tidey v. Mollett*, 16 C. B. N. S. 298, 309 (E. C. L. R. vol. 111), per Erle, C. J. This is a condition precedent to the payment of the freight in advance: *Behn v. Burness*, 3 B. & S. 751, pl. 4, 5, 6; *Graves v. Legg*, 9 Exch. 709, 717.

The judgment of the Court below proceeded on the ground of the *36] unreasonableness of construing the *condition as a condition precedent, but does not advert to the fact that, the ship being guaranteed 577 tons only, the defendant could have had no remedy by cross action for the ship not carrying the difference between 577 and 1000 tons. And if that were given in evidence in reduction of damages, the balance would be in favour of the defendant, for the plaintiff claims 219*l.*, whereas the claim of the defendant in the event of reduction for short capacity would be 224*l.* The plaintiff has his remedy by lien on the bill of lading in respect of the quantity of goods put on board and carried to Sydney, and at a higher freight than provided for by the charter-party; or on a quantum meruit. The doctrine, that if a partial benefit has been received the condition ceases to be available as such, which was stated by Williams, J., in delivering the judgment of this Court in *Behn v. Burness*, in error, 3 B. & S. 751, 755 (E. C. L. R. vol. 113), does not apply here. The balance of freight is claimed

by the defendant as payable on the sailing of the ship, and at that time no benefit was received by the charterer, and no freight had been earned; and if freight were paid in advance and the ship were lost, the charterer would get no benefit, as there is no allowance for insurance.

Mellish (*Kemplay* with him), for the plaintiff, was not called upon.

ERLE, C. J.—We are all of opinion that the judgment of the Court below, on both points, ought to be affirmed. The argument turned on that portion of the charter-party in which payment of the sum of 1550*l.*, for the use and hire of the ship in respect of the voyage from *Liverpool to Sydney, is stipulated for, “on condition of her tak- [*37 ing a cargo of not less than 1000 tons of weight and measurement.” The action is brought to recover the balance due after deducting 1330*l.* 8*s.*, for which bills had been given for freight, payable in Sydney, and the defence is that the condition was not performed.

The defendant says that the meaning of the condition is, that the ship should take on board a Sydney cargo of not less than 1000 tons of weight and measurement, and that a Sydney cargo is of an unusual proportion in this, that it consists of two-thirds weight and one-third measurement, whereas an ordinary cargo is the reverse. I think this is not to be construed as a stipulation for a Sydney cargo. The phrase “the vessel taking,” means that the vessel is capable of taking a cargo of 1000 tons of weight and measurement in the ordinary proportions, and not on the supposition of there being an unusual cargo. It is found by the jury that the vessel was capable of taking a cargo of 1000 tons of ordinary weight and measurement; therefore there is no breach of condition, and the defendant has no defence on his appeal.

The defendant has also brought error on the judgment of the Court below upon demurrer to the third plea, which is, that the condition of the ship “taking a cargo of not less than 1000 tons of weight and measurement” was not performed. Even if we construe the words as a condition precedent in the strict sense, the stipulation for freight is divisible in its nature, and, being so, the case falls within the principle stated by Williams, J., in *Behn v. Burness*, in error, 3 B. & S. 751, 755 (E. C. L. R. vol. 113), that where *the whole or any substan- [*38 tial part of the consideration for the promise of the one party has been received by the other, the latter cannot treat it as a condition, but as a stipulation for breach of which he may obtain compensation in damages. Here the hull of the ship has been placed at the disposal and service of the charterer, and if there were matter by reason of which he might have refused to take the ship, or for which he might be indemnified in reduction of damages when he has put on board a cargo, still he cannot be allowed to say that he will not pay anything.

POLLOCK, C. B., WILLES and KEATING, JJ., CHANNELL and PIGOTT, BB., concurred. Judgment affirmed.

DINGWALL and Others v. EDWARDS. Feb. 22.

[Reported Vol. 4, p. 738 (E. C. L. R. vol. 116).]

***39] *BRAMWELL (Official Assignee of SERVICE, a Bankrupt), v. EGLINTON. Feb. 22.**

Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, ss. 98, 103.—Relation.—Adjudication.—Petition in formâ pauperis.—Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 133.—Bill of sale.—Demand and seizure.—Taking an acceptance.

On the 22d October, 1862, by deed between S. and the defendant, S., in consideration of 50*l.* advanced by the defendant, assigned all his household furniture and effects to the defendant, with a proviso for making the deed void if S. should, on demand in writing given to him, or left at his last place of abode, pay the 50*l.* with interest; and in default of payment contrary to the proviso, "then at any time" thereafter the defendant was empowered to take possession of and sell the goods; and until default S. was to retain possession of them. At the same time S. gave the defendant his acceptance at four months for 50*l.* as collateral security, which the defendant endorsed over for value. On the 12th February, S. was taken in execution and committed to the county gaol. On the 16th, the defendant, knowing S. to be in gaol, left a demand in writing at his house, and took possession of the goods the same evening, and continuing in possession sold them on the 13th March. On the 18th February, S. having made the affidavit required by sect. 98 of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, petitioned in formâ pauperis, and on the 23d was brought up to the County Court and adjudicated a bankrupt under the 99th section. In trover by the official assignee against the defendant: Held,

1. That if the taking possession on the 16th February, the day of the demand, was premature, that did not prevent the defendant from taking possession afterwards in due time.

2. That the taking of the acceptance and endorsing it over for value did not suspend the right of the defendant to take possession under the bill of sale.

3. That by sect. 103 of stat. 24 & 25 Vict. c. 134, the adjudication related back to the date of the commitment of S. to prison, and therefore the goods which were then in his order and disposition by the consent of the defendant passed to the official assignee, and the transaction was not protected by sect. 133 of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106.

4. *Quære*, whether sect. 103 applies to an adjudication made by the registrar under sect. 101?

THE first count of the declaration alleged a conversion of goods of C. G. Service before he became bankrupt. The second count alleged a conversion of goods of the plaintiff as assignee after C. G. Service became bankrupt.

Pleas. First, to both counts. Not guilty. Second, to the first
***40]** count. That the goods were not the goods of C. G. Service. Third, to the second count. That the goods were not the goods of the plaintiff as assignee.

Issues thereon.

On the trial, before Mellor, J., at the Durham Summer Assizes, 1863, it appeared that the action was brought by the plaintiff, who was registrar of the County Court of Durham, holden at Durham, to recover the value of goods of the bankrupt Service, seized and sold by the defendant under a bill of sale given to him by the bankrupt.

The bill of sale was by deed between the bankrupt Service and the defendant, and was executed by the bankrupt, who was a shipowner at Sunderland, on the 22d October, 1862; and by it, in consideration of 50*l.* advanced to him by the defendant, he assigned to the defendant all his household furniture and effects, with a proviso for making the deed void if Service should on demand, by notice in writing to be given by the defendant to him or left at his last place of abode in England, pay to the defendant the sum of 50*l.* and interest at 5*l.* per cent. per annum, and also a proportionate sum for any portion of a half year between the last half-yearly day of payment and the giving of the notice. Then followed a covenant by Service to pay the 50*l.* and interest; and in

default of payment contrary to the proviso "then at any time" thereafter the defendant was empowered to take possession of and sell the goods, holding any surplus after payment of the 50*l.* with interest and expenses in trust for Service; and until default Service was to retain possession of the goods. The bill of sale was duly registered on the 25th October, 1862.

At the time the bill of sale was executed the *defendant also drew a bill of exchange upon Service for the 50*l.* secured by the bill of sale. The bill of exchange was dated the 22d October, 1862, payable four months after date, was accepted by Service, and endorsed over by the defendant for value. [*41]

Service remained in possession of the goods which were the furniture of the house in which he and his wife resided. On the 12th February, 1863, he was arrested under a *capias ad satisfaciendum* at the suit of a creditor for 33*l.* 10*s.*, and lodged in Durham Gaol. On the morning of the 16th February, the defendant, who was aware that Service had been arrested and was in gaol, left a notice in writing at the dwelling-house of Service demanding payment of the 50*l.* and interest secured by the bill of sale; and on the same evening the defendant's clerk took formal possession of the goods under the bill of sale.

On the 18th February, Service, in pursuance of sect. 98 of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, presented a petition in formâ pauperis, addressed to the County Court of Durham, holden at Durham, praying that he might be adjudged a bankrupt, and at the same time filed the usual affidavit that he had not the means of paying the usual fees and expenses. On the 23d, not having been previously discharged by a registrar, he was, in pursuance of sect. 99, brought up to the County Court, which made an order of adjudication in bankruptcy against him, granted him an order of protection and ordered his discharge from custody.

The acceptance given by Service to the defendant became due on the 25th February. On the 23d, after his discharge from custody, Service first became aware of the notice demanding the 50*l.*

*On Service being adjudicated bankrupt, the plaintiff as the registrar of the Court became official assignee, and as no creditors' assignee was chosen at the meeting of the creditors, he, by virtue of his office, became sole assignee of the bankrupt's estate and effects, and, as such, demanded the goods of the defendant; but the defendant declined to give them up, and on the 13th March sold them under the bill of sale by public auction. [*42]

It was contended for the plaintiff: First, that the adjudication against the bankrupt in formâ pauperis related back to the 12th February, the day of his commitment to prison, so as to invalidate the seizure of the goods by the defendant under the bill of sale which was made after the bankrupt's commitment though before the filing of his petition. Secondly, that the demand of 50*l.* under the bill of sale was not reasonable, being made at the dwelling-house of the bankrupt at Sunderland when he, to the knowledge of the defendant, was in the county gaol at Durham, and possession of the goods having been taken on the same day. Thirdly, that a bill of exchange having been given by the bankrupt to the defendant as a collateral security for the debt for which the bill of sale was given, and that bill having been endorsed over by the

defendant and being outstanding, the defendant was not in a condition to make a demand under the bill of sale.

The learned Judge directed a verdict for the plaintiff, reserving leave to move to enter a nonsuit or a verdict for the defendant, the Court to be at liberty to draw inferences of fact.

Of sections 98-105 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, which are a series under the heading, **“As to adjudication*
 *43] *of bankruptcy against pauper and other prisoners for debt,”* the following are material:—

Sect. 98. “If any debtor, whether a trader or not, now being or who shall be imprisoned for any debt or demand, shall through poverty be unable to petition the proper Court for an adjudication of bankruptcy against himself, he shall be at liberty to petition *in formâ pauperis*, upon making an affidavit that he has not the means of paying the fees and expenses usually payable in respect of a petition by a debtor for an adjudication of bankruptcy.” Such affidavit to be sworn before the gaoler of the prison where such debtor is confined.

Sect. 99. “Every person so petitioning *in formâ pauperis* as aforesaid shall, if not previously discharged by a registrar, be brought up to the County Court of the district at its next sitting after the presentation of such petition, and shall be examined by the court touching his estate and effects, debts, dealings, and transactions; and if the Court shall be satisfied with such examination it shall make an order of adjudication of bankruptcy against the petitioner, and, if it think fit, grant an order of protection to the petitioner.”

Sect. 100. The gaoler of every prison, &c., shall on the first day of every month make a return of persons in custody “upon any process whatsoever, for or by reason of any debt, claim, or demand whatsoever,” the date of their imprisonment, the nature and amount of the debts or demands, and whether they are willing or refuse to petition the Court of Bankruptcy or are unable to do so by reason of poverty; also the name and address of every creditor at whose suit they are imprisoned or detained.

*44] Sect. 101. The Registrar of the Court of Bankruptcy *or of the County Court shall on the day named in an order to be made by the Commissioner or County Court Judge, notice of which order is to be forthwith given to the gaoler, “and also to the execution and detaining creditors of every prisoner included in such return,” attend at the prison and examine every prisoner included in such return touching his estate and effects, debts, dealings and transactions, and ascertain the last place of abode and business of each prisoner within the six months next prior to his imprisonment, and shall have power to make an order of adjudication in bankruptcy against every such prisoner and to grant him protection and to make an order for his release from prison, and shall also direct in what Court such adjudication shall be prosecuted.

Sect. 102. “If the prisoner shall refuse to appear or to be sworn, or to answer all lawful questions of such registrar or of the execution or detaining creditor, or of any other creditor who shall be present, respecting his debts, liabilities, dealings, and transactions, or to make a full discovery of his estate and effects, and of all his books of account, or to produce the same, or to sign his examination when taken, the registrar shall report the same to the Court, and the Court may, by warrant under

the hand and seal of the Judge or Commissioner, commit him to the common gaol of the county, there to be kept, with or without hard labour, for any time not exceeding one month, and the Court may at the same time adjudge such prisoner bankrupt; provided that if after such adjudication the bankrupt shall, before the period of such commitment has expired, submit to be examined, and in all things conform to the jurisdiction of the Court, he shall have in all respects the same *benefit [*45 as if he had submitted to the Court in the first instance."

Sect. 103. "Every adjudication against any prisoner for debt so brought up as aforesaid shall, unless the Court shall otherwise direct, have relation back to the date of his commitment or detention as the case may be, and shall be as valid and effectual for all purposes as if it had been made under any other of the provisions of this Act."

In Michaelmas term,

Edward James obtained a rule nisi to enter a nonsuit or a verdict for the defendant pursuant to leave reserved, on the ground that on the evidence the defendant was entitled to succeed.

The rule was argued and two points disposed of on February 3d.

Quain showed cause.—First. Sect. 103 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, which provides that the adjudication against any prisoner for debt, "so brought up as aforesaid," shall relate back to the date of "his commitment or detention," applies to prisoners petitioning in formâ pauperis and adjudicated bankrupt under sections 98 and 99. Sect. 99 is the only clause in the preceding sections in the group which contains the words "brought up," and no other section mentions a bringing up of the prisoner. [MELLOR, J.—Unless the words in sect. 103 "so brought up as aforesaid" are confined to prisoners who petition in formâ pauperis, they seem to be surplusage.] And the "commitment or detention of the prisoner" mean his original commitment for debt or his detention for debt under sect. 71, which declares that "if any [*46 *debtor, whether a trader or not, having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, shall, upon such or any other arrest or commitment for debt or nonpayment of money, or upon any detention for debt, lie in prison, being a trader, for fourteen days, or, not being a trader, for two calendar months, or, having been arrested for any cause, shall lie in prison as aforesaid, after any detainer for debt lodged against him, and not discharged, every such debtor shall thereby be deemed to have committed an act of bankruptcy." If the commitment or detention in sect. 103 had been intended to refer to cases under sect. 102, the language would have been, "such commitment or detention." [CROMPTON, J.—But sect. 71 mentions also "arrest" for debt: the framer of the act seems to have omitted that word in sect. 103 because it would not apply to cases under sect. 102.] The word "arrest" is accidentally omitted in sect. 103; and in sect. 71 the words "arrested" and "committed" are used as synonymous. [BLACKBURN, J.—Commitment properly refers to attachment, and arrest to debt.] The word "commitment" in sect. 103 is used in the sense of confinement for debt, as in sect. 36 of stat. 1 & 2 Vict. c. 110. [BLACKBURN, J.—It applies to imprisonment under final process.] When a man is arrested on mesne process under stat. 1 & 2 Vict. c. 110, s. 3, it is not ascertained that there is a debt. [CROMPTON, J.—The Insolvent Debtors Acts apply to imprisonment whether on

mesne or final process.] And probably stat. 24 & 25 Vict. c. 134 so applies. There is good reason for making the adjudication upon a petition in formâ pauperis relate back to the date of the original commitment and not to the filing of the petition, otherwise *a prisoner *47] for debt might divest himself of all his property after his commitment, and then come before the Court in formâ pauperis. Sect. 86, by which the filing of a petition for adjudication is declared to be an act of bankruptcy, does not govern the cases of adjudication of bankruptcy against paupers. [BLACKBURN, J.—Is it not a harsh enactment to make the adjudication relate back if a debtor has lain in prison twenty years, and then takes the benefit of the proviso at the end of sect. 102? The doctrine of relation is not needed in order to get rid of a transaction which can be proved to be dishonest: it may be dealt with under stat. 13 Eliz. c. 5.] Sect. 103 cannot refer to the cases of recusant prisoners provided for in sects. 101, 102, because, under sect. 101, the prisoner is not brought up before the registrar, but the registrar attends at the gaol, and under sect. 102 the court is empowered to commit, and at the same time adjudge such prisoner bankrupt, and so, the commitment and adjudication being contemporaneous, there could be no relation back.

Secondly. The money secured by the bill of sale, was not payable until after a demand in writing, and the demand must allow a reasonable time for payment before possession is taken under the bill of sale: *Toms v. Wilson*, 4 B. & S. 442 (E. C. L. R. vol. 116), affirmed on appeal, *Id.* 445. Here the possession was taken on the same day as the demand was made, without waiting for any communication from Durham, where the debtor was in prison. And if the first seizure was an act of bankruptcy, it taints the whole transaction.

Thirdly. The giving of an acceptance as collateral security for the debt secured by the bill of sale, was a *conditional or contingent *48] payment of the debt; and as it was outstanding and endorsed over, no debt was due to the defendant, and therefore he was not in a condition to make a demand. [BLACKBURN, J.—A right of stoppage in transitu may be exercised notwithstanding a bill of exchange has been given; so also the power of entry under a mortgage deed.]

Lewers, in support of the rule.—First. The 103d section of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, applies only to the case of commitment or detention in sect. 102. When a prisoner for debt is reported as recusant by the registrar, he must be brought up before the commissioner or County Court Judge, for the Court would not commit him on the report of the registrar without hearing what he had to say; and then the Court would either commit him and postpone final adjudication until the next monthly attendance of the registrar at the prison when the prisoner might submit, or would not commit nor adjudicate; in which case the prisoner would be detained. The words “brought up,” are impliedly in sect. 102, and there would be either a commitment or detention; and in either case sect. 103 prevents the title of the assignees from being prejudiced by the contumacy of the prisoner. [BLACKBURN, J.—The detention in the latter case is not a detention in the artificial sense of that word.] “Detention” describes the state of the prisoner,—he is sent back to be detained under the previous process by which he was arrested. If the word “commitment” means arrest, the word “detention” is inoperative. If sect. 103 was intended to refer only to

the cases under sects. 98, 99, there is no reason for placing it after sect. 102. The Court will not, in *construing an Act of Parliament, [*49 favour the doctrine of relation of an adjudication in bankruptcy: *Clarke v. Ryall*, 1 W. Bl. 642. [CROMPTON, J.—Where a relation is contrary to the course of common law, the onus of showing that the statute enacts it is on the party who relies upon it.]

Further, if the word commitment, in sect. 103, is construed to mean the arrest or commencement of the imprisonment, the seizure was protected by sect. 133 of The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which is not repealed by stat. 24 & 25 Vict. c. 134, s. 230, and Sched. (G.), “as being a dealing or transaction with the bankrupt “without notice of any prior act of bankruptcy committed by him;” *Graham v. Furber*, 14 C. B. 134 (E. C. L. R. vol. 78). In *Conway v. Nall*, 1 C. B. 643 (E. C. L. R. vol. 50), Tindal, C. J., said, p. 649, “The meaning of these words” (i. e. the similar words in stat. 2 & 3 Vict. c. 29, s. 1), “appears to me to be, that the party, in order to defeat an execution, shall have notice of a prior act of bankruptcy complete in itself at the time the notice is given to him.” On the 16th February the defendant had notice only of an arrest. [He also cited *Edwards v. Gabriel*, 7 H. & N. 520, *King v. Leith*, 2 T. R. 141, *Thompson v. Beatson*, 1 Bing. 145 (E. C. L. R. vol. 8).]

On the second point he was not called upon.

Thirdly. The giving of the bill of exchange simultaneously with the execution of the bill of sale, which was under seal, did not extinguish the right of the defendant under the bill of sale: *Davis v. Gyde*, 2 A. & E. 623 (E. C. L. R. vol. 29), *Worthington v. Wigley*, 8 Bing. N. C. 454 (E. C. L. R. vol. 32). [BLACKBURN, J.—At most it could only be ground for an equitable plea.] [He was then stopped.]

**Mellish* was heard as to stat. 12 & 13 Vict. c. 106, s. 133. [*50 That section renders valid bonâ fide transactions which would otherwise be invalid by reason of the relation of the title of the assignees to a prior act of bankruptcy, declared such on the petition of a creditor, but does not apply to a case in which there has been no act of bankruptcy, or where a man becomes bankrupt on his own petition, and the only question is whether goods were in the order and disposition of the bankrupt at the time of his bankruptcy. If it applied where a party could not have notice of an act of bankruptcy, none having been committed, every transaction would be rendered valid, and the object of the bankrupt laws frustrated.

Lewers.—Sect. 103 of stat. 24 & 25 Vict. c. 134, does not give an effect to the relation under it different from that which an ordinary relation under an adjudication has. If there is no act of bankruptcy, honest and bonâ fide transactions with a bankrupt ought to be protected.

BLACKBURN, J.—We can at once dispose of two of the points, on which my brother Mellor and myself are agreed. And my brother Crompton also, before he left the Court, expressed to us the same opinion.

There is nothing in the point that the demand was followed up by taking possession prematurely, because if it were premature to take possession on the 16th February, which was the day of the demand, that act would not prevent the defendant from taking possession in due time; that is after the lapse of a reasonable time, and here he continued

in possession until the 23d February, the day on which the adjudication was made.

*51] *Also the fact of a bill of exchange having been taken on account of the debt secured by the bill of sale would not prevent the defendant from taking possession of the goods in order to secure the lien legally vested in him. In this respect the case is extremely analogous to *Davis v. Gyde*, 2 A. & E. 623 (E. C. L. R. vol. 29), in which it was held that the receiving a promissory note on account of rent due did not extinguish the claim for such rent or suspend the right to distrain for it. So, here, the bill of exchange given on account of a specialty debt secured by the bill of sale does not suspend the right to take possession under the bill of sale. Whether there would be an equitable right to stay the sale if the holder of the bill of sale proceeded to sell, we need not consider.

Therefore the property was taken out of the order and disposition of the bankrupt before the 23d February.

There remains the question whether sect. 103 of The Bankruptcy Act, 1861, does not make the adjudication in this case relate back to the time when the bankrupt was committed to gaol, and operate as if it had been made at that time. That depends on the construction of the statute; and we will take time to consider, and consult with my brother Crompton whose judgment will assist us.

MELLOR, J., concurred.

Cur. adv. vult.

The judgment of the Court was now delivered by

*52] CROMPTON, J.—In this case I heard only part of the *argument; but I agree with the judgment which has been prepared by my brother Blackburn, which I now proceed to read as the judgment of the Court, including myself, so far as I ought to take part in it.

On the argument we disposed of some minor questions which were raised, and took time to consider as to the effect of sect. 103 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, as applied to the following facts.

The bankrupt was taken in execution and committed to gaol upon the 12th February, 1863. On that day the goods for the conversion of which the action is brought were in the apparent order and disposition of the bankrupt by the consent of the defendant, who was the true owner of those goods. On the 16th February the defendant took possession of them. On the 18th, the bankrupt being in prison and having made the affidavit required by the 98th section of The Bankruptcy Act, 1861, petitioned in formâ pauperis, and on the 23d he was brought up to the County Court, and adjudicated a bankrupt under the 99th section of the Act.

The plaintiff contends that the effect of section 103 is that the adjudication (though made in fact on the 23d February after the goods of the defendant were taken out of the possession of the bankrupt) has the same effect in law as if it had been made on the 12th February, when the bankrupt was committed to prison, at which time the goods in question were in the apparent ownership of the bankrupt by the consent of the true owner; and though much embarrassed by the manner in which the Act is framed we have come to the conclusion that we must construe the

*53] 103d clause as having this effect.

*The Bankruptcy Act of 1861 does not merely alter the law

of bankruptcy as applicable to traders, but also makes it applicable to non-traders, and substitutes this new system for the old Insolvent Debtors Acts. It accordingly contains a series of clauses, under a head "As to adjudication of bankruptcy against pauper and other prisoners for debt." Two principles seem to have been determined on by those who formed the general scheme of legislation on the subject. First, that prisoners who really were paupers should have an easy and effectual mode of being discharged; and secondly, that it should no longer be in the option either of the debtor or the creditor to let the debtor lie in prison keeping his property, but that in all cases there should be a compulsory discharge of the prisoner and an assignment of his property for the benefit of all his creditors. The sections under this head provide effectually for carrying those two principles into execution. But there remained a subordinate but very important question of detail, viz., how far and in what manner the discharge of the prisoner under the new system should affect the rights of third persons. Before The Bankruptcy Act, 1861, those rights were not affected in the same way when the prisoner was discharged as having become a bankrupt, and when he was discharged under the Insolvent Debtors Acts. A prisoner for debt might, under the old system, if he was a trader, be made a bankrupt as soon as he had lain in prison for twenty-one days, for that was an act of bankruptcy. The title of the assignees to any property which had belonged to the bankrupt then related back to the completion of the act of bankruptcy; that is, to the twenty-first day of the imprisonment. They had also a right to take *property not be- [*54
longing to the bankrupt, but allowed to be in his apparent ownership at that date, as being that of the act of bankruptcy, and the limitation of the landlord's right to distrain to one year's rent was with reference to that date. But all honest transactions between the act of bankruptcy and the time when the trader was declared a bankrupt (either by the commission, fiat, or adjudication, as the mode of doing so was altered) were protected unless there was notice of an act of bankruptcy. If, however, the prisoner, whether a trader or not, was discharged under the Insolvent Debtors Act, these matters were all different. The title of the assignees to what had been his property began with the vesting order, and had no relation to any other period. But by stat. 1 & 2 Vict. c. 110, s. 57, the provision as to apparent ownership applied to the apparent ownership at the date of the prisoner's "arrest, or other commencement of his imprisonment," and there was no clause giving any protection to transactions without notice, so that if the true owner removed the goods out of the prisoner's possession after the arrest, even though in complete ignorance that there had been an arrest, the transaction was not protected. So, by sect. 58, the date after which a distress for rent could only be available for one year's rent is not that of the vesting order but of the commencement of the imprisonment.

When, by The Bankruptcy Act, 1861, the principle had been adopted that one mode of discharging the prisoner should be substituted for the two heretofore in use, it might have been expected that some provision would have been inserted to show whether the rights of third persons were to be affected according to the system heretofore in use in bank- [*55
ruptcy, according to *the system heretofore in use in insolvency,

or according to some new system supposed to be more equitable and expedient than either. But the only provision is sect. 103. [His Lordship read it.] We have great difficulty in seeing what was here meant; but we must, we think, give that effect to the language of the Legislature which it seems to us it bears construed in its grammatical sense.

Sect. 103 follows immediately after sect. 102, by which it is provided that, if the registrar report to the Court (that is of bankruptcy) a prisoner as contumacious, "the Court" may "commit" him to the common gaol, there to be kept with or without hard labour, and the Court may at the same time adjudge such prisoner bankrupt. Here we have two of the words used in sect. 103 brought very near to it, and it was contended by the defendant's counsel that sect. 103 must be taken to refer to such commitment as last mentioned, viz., the commitment of the contumacious prisoner by the Court of Bankruptcy, and that though it was not expressly said that he was to be brought up before the Court of Bankruptcy before he was committed, yet inasmuch as that Court are to exercise a judicial discretion as to whether he is to have hard labour, it was necessarily implied he was to be brought before it; and if the only objection to this construction had been that the words are "brought up *as aforesaid*," instead of "as afore implied," we should have had no great difficulty in getting over that objection. But under sect. 102 the court is in general to make the adjudication at the time of the commitment for contumacy, and it is an absurdity to enact that the adjudication should relate back to an act *contemporaneous with it. It *56] was urged that the court *might* postpone the adjudication till after the prisoner had submitted, and then it would be fit that it should have the same effect as if made when he was committed; but this gives no sense whatever to the word "detention," which seems clearly to give the meaning to "commitment." A prisoner in custody under final process is kept in prison either by virtue of his "commitment," if he was originally taken in execution for a still existing debt, or his "detention" if the debt for which he was originally taken in execution is discharged but he is detained by some other creditor; and in sect. 101 the execution and detaining creditors are mentioned, showing that the draftsman had very recently recollected the distinction between the two. These words seem to us to show that the section is applicable to prisoners kept in gaol under final process. We are obliged therefore to say that sect. 103 cannot refer to sect. 102.

Going back we come, in sects. 100 and 101, to the cases in which the registrar goes to the gaol after notice given to the execution and detaining creditors, and there makes an adjudication. The question whether sect. 103 applies to adjudication thus made is not now before us; it is difficult to see how the words "brought up as aforesaid" can apply where the registrar goes to the prisoner. There may be a want of words to apply the enactment to these cases. But it is also difficult to see why, if the Legislature made such a provision as to pauper prisoners when they themselves petition, and consequently are brought up to the County Court, it should not have extended it to those discharged by the registrar. We need not express any opinion upon this *point, *57] leaving it to be discussed hereafter, unless the Legislature, as is

much to be desired, interfere and make clear enactments as to the details of this very important Act.

We now come to sect. 99 under which every prisoner petitioning in formâ pauperis shall, if not previously discharged by a registrar, "be brought up to the County Court of the district," and "if the Court" shall be satisfied with his examination, it shall make an order of adjudication of bankruptcy against the petitioner. "The Court" primâ facie means the Court of Bankruptcy; but by the interpretation clause, sect. 229, it shall also mean "any County Court acting under this Act." It was asked in the argument why, if sect. 103 was intended to apply to sect. 99, and to it alone, it was dislocated from it. It would surely, it was said, have been made the 100th section if it was intended to be a proviso on the 99th. Why also, it was asked, was the word "arrest" omitted. It is found connected with the words "commitment" and "detention" in sect. 71, a section much in pari materiâ; and it could hardly be intended to exclude from the enactment those prisoners who had been arrested on mesne process, but not committed in execution. As we have already said, we think that the words show that the section is applicable to prisoners committed or detained on final process. The questions asked on the argument we cannot answer in any way satisfactory to ourselves. But it still remains the fact that the words of sect. 103 are all satisfied by applying that enactment to the case of a prisoner who has been committed in execution or is detained for debt, and is brought up before the County Court under sect. 99, and are not satisfied by applying them to *anything else that we can find. [*58. We must therefore construe the provision as applying to this case.

The 133d section of The Bankrupt Law Consolidation Act, 1849, protects all bonâ fide transactions prior to the fiat, notwithstanding any prior act of bankruptcy, unless there was notice of the act of bankruptcy; and if the 103d section of the present Act had made the adjudication relate back to the commitment or detention as an act of bankruptcy, the defendant in this case would have been protected; but the enactment, whether intentionally or not, makes the adjudication relate back absolutely, and consequently we think there is no protection.

The rule must therefore be discharged.

Rule discharged.

TAYLOR and Others v. DEWAR. Feb. 22.

Marine insurance.—Running-down clause.—Personal injury to crew.—9 & 10 Vict. c. 93.

A policy of marine insurance for 4000*l.* for twelve months on the ship "Rouen" and her freight, contained the following clause: "And we the assurers do further covenant and agree that in case the said vessel shall, by accident or negligence of the master or crew, run down or damage any other ship or vessel, and the assured shall thereby become liable to pay and shall pay as damages any sum or sums not exceeding the value of the said vessel Rouen and her freight, by or in pursuance of any judgment of any Court of law or equity given in any suit or action defended with our previous consent in writing, or by or in pursuance of any award made upon reference entered into by the assured with our previous consent in writing, we the assurers shall and will bear and pay such proportion of three-fourth parts of the sum so paid as aforesaid, as the sum of 4000*l.* hereby assured bears to the value of the said vessel Rouen and her freight." The ship "Rouen" having run down another ship, whereby some

of her crew were drowned, and the owners of The Rouen having been condemned by the Court of Admiralty to pay damages to the personal representatives of the deceased for the loss of those lives: held, that the above clause did not apply.

THIS was an action on a policy of insurance, dated 6th September, 1860, for 4000*l.*, for twelve calendar months, upon the ship "Rouen" *59] and her freight. The *declaration set out the following covenant in the policy:—"And we the assurers do further covenant and agree that in case the said vessel shall, by accident or negligence of the master or crew, run down or damage any other ship or vessel, and the assured shall hereby become liable to pay and shall pay as damages any sum or sums not exceeding the value of the said vessel Rouen and her freight, by or in pursuance of any judgment of any court of law or equity given in any suit or action defended with our previous consent in writing, or by or in pursuance of any award made upon reference entered into by the assured with our previous consent in writing, we the assurers shall and will bear and pay such proportion of three-fourth parts of the sum so paid as aforesaid as the sum of 4000*l.* hereby assured bears to the value of the said vessel Rouen and her freight."

Averment. "Afterwards and while the said ship, during the said period of twelve calendar months covered by the said policy, was navigating the seas within the limits of time and place allowed by the said policy, and during the continuance of the said risk insured against, the said ship, by accident or negligence of the master and crew thereof, ran down and damaged a certain other vessel called the Magyar, and thereby caused her to sink at sea with her master and divers, to wit, five persons of her crew then on board of the said Magyar, whereby the said Magyar was lost, and her said master and the said five persons, part of her crew, were drowned and lost also, and thereby the plaintiffs became liable to pay and did pay to the owners of the said Magyar the *60] damages arising from the said loss of the said vessel, and to the *personal representatives of the said master and other persons of the crew so drowned as aforesaid respectively, the damages sustained by and due to them respectively by and for the loss of the lives of the said master and other persons respectively so occasioned as aforesaid, by and in pursuance of certain judgments of the High Court of Admiralty and of Her Majesty's Privy Council, on appeal, given in certain suits in the said Courts, which were defended by the plaintiffs with such consent of the defendant as by the said policy required; such several damages amounting together to a large sum of money, to wit, 3700*l.*, not exceeding the value of the said ship Rouen, and that such proportion of three-fourth parts of the sums so paid as damages as the sum of 4000*l.* have to the value of the said ship Rouen amounted to a large sum, to wit, 800*l.*, and that no freight was earned or being carried by the said ship Rouen at the times of the loss and damage aforesaid, and that the defendant's proportion of the last-mentioned sum of money, in respect of the sum insured by him as aforesaid, amounted to the sum of 20*l.*, and all conditions were fulfilled, &c."

Demurrer to so much of the declaration as related to the claim of the plaintiffs in respect of the moneys paid by them to the personal representatives of the master and other persons of the crew so drowned as therein mentioned.

Joinder in demurrer.

The case was argued, in Michaelmas Term, 1863, November 17th, before COCKBURN, C. J., WIGHTMAN, J., who died before judgment was delivered, BLACKBURN and MELLOR, JJ.

**Sir George Honyman*, in support of the demurrer.—The underwriter on a policy of marine insurance in the general form [*61] is not liable to make good damages which the assured has been compelled to pay in consequence of a ship having been run down and injured, and persons on board having been killed or injured, by accident or negligence of the persons navigating the ship insured: *De Vaux v. Salvador*, 4 A. & E. 420 (E. C. L. R. vol. 81). In consequence of this state of the law, clauses like the present, commonly called “running-down clauses,” have been introduced into marine policies; and the question is whether under such a clause the insurer is liable to make good to the owner of the ship insured the amount he may have had to pay, either at common law or under Lord Campbell’s Act, 9 & 10 Vict. c. 93, as compensation for the limbs or lives of the persons injured or killed. The covenant here is limited to damage done to the ship or vessel; and it is clear that injuries might be done to the crew on board a ship without injury to the ship, as for instance when a man is knocked off a ship’s bowsprit. On the other hand a ship may be run down without injury to any person on board. [BLACKBURN, J.—A small ship might run against the Warrior and be sunk by the collision while the Warrior received no injury.]

Manisty (J. Brown with him), contra.—The Court should not put a narrow construction on clauses of this kind, but look at the reason which occasioned their introduction into policies of insurance. When a ship is run down by another there is no real distinction between damage occasioned to the ship and damage *occasioned to the crew: [*62] the same general principles apply to both; as appears from the Scotch case of *Coey v. Smith*, 22 Court of Session Cases 955, decided by the Lord Justice-Clerk, Lords Wood, Cowan, and Benholme, on a policy of insurance on the ship *Excelsior*. [He also cited *Thompson v. Reynolds*, 7 E. & B. 172 (E. C. L. R. vol. 90). BLACKBURN, J.—For injury to ship and goods the ship may be attached in the Court of Admiralty by a proceeding in rem, but can that be done for injury to the person?] The Court of Admiralty could always award full compensation for the damages, both direct and consequential, which were sustained by a collision: *Maude & Pollock on Merchant Shipping*, p. 415, 2d ed., where several cases are cited: but even were this otherwise stat. 24 & 25 Vict. c. 10, s. 7, enacts, “The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.” [He also referred to *The Merchant Shipping Act*, 1854, 17 & 18 Vict. c. 104, ss. 506–7–8.]

Sir George Honyman, in reply,—In *Coey v. Smith* the decision of the Court was at variance with the judgment of the Lord Ordinary, but independent of that the case is distinguishable from the present on two grounds:—First. There the policy attached on the mere circumstance of the ship coming into collision with another vessel, whereas here it is on her destroying or damaging any other vessel. Secondly. The policy there contained the words, if the assured shall “in consequence thereof” become liable to pay, &c. The Scotch law holds the underwriter liable for the remote as well, as for the proximate cause of mischief, but the

*63] English law looks solely to *the proximate cause: *Ionides v. The Universal Marine Insurance Company*, 14 C. B. N. S. 259 (E. C. L. R. vol. 108). [BLACKBURN, J.—*Livie v. Janson*, 12 East 648, is to the same effect. It is a very intelligible principle, but very difficult to apply. Still a party may by covenant render himself liable for remote damage. His Lordship referred to *Patrick v. The Commercial Insurance Company*, 11 Johns. (U. S.) Rep. 14.] The present policy having been effected in September, 1860, stat. 24 & 25 Vict. c. 10, which received the Royal assent 17th May, 1861, is inapplicable to it. *Cur. adv. vult.*

The judgment of the Court was now delivered by

MELLOR, J.—This case was argued before the Lord Chief Justice, the late Mr. Justice Wightman, my brother Blackburn, and myself.

The question turns on the effect to be given to a clause in a policy of marine insurance, of recent introduction into such instruments, and generally known by the name of the collision clause; the object of which is to secure the shipowner against damages which he may be compelled to pay for injury done to others by his vessel coming into collision with another, either through accident or negligence; such damages not being by the law of England, as settled by the case of *De Vaux v. Salvador*, 4 A. & E. 420 (E. C. L. R. vol. 31), recoverable under a policy of insurance in the ordinary form.

In the present case the clause is as follows: "In case the said vessel shall, by accident or negligence of the master or crew, run down or *64] damage any other ship *or vessel, and the assured shall thereby become liable to pay and shall pay as damages any sum or sums not exceeding the value of the said vessel Rouen and her freight, by or in pursuance of any judgment of any Court of law or equity . . . the assurers shall and will bear and pay such proportion of three fourth parts of the sum so paid as aforesaid as the sum of 4000*l.* hereby assured bears to the value of the said vessel Rouen and her freight."

The vessel insured under this policy, The Rouen, having come into collision with and run down another ship called The Magyar, and the master and five of the crew of the latter having been drowned, the owners of The Rouen have, by the judgment of the Court of Admiralty, been condemned to pay damages to the personal representatives of the deceased, and such damages have been paid accordingly. And the question raised by the demurrer in this case is whether, under the clause in question, the amount thus paid can be recovered back; the controversy being, whether the provision for indemnity applies to damages paid by the assured in respect of personal injury arising from collision through negligence. We are, after much consideration, of opinion that it does not, and that our judgment should be for the defendant.

It was contended, on the part of the plaintiff, that the death of the deceased having been occasioned by the running down of The Magyar, through the negligence of the master and crew of the ship insured, the damages which the plaintiff had been compelled to pay were within the words of the clause, and must be held to be within the indemnity. But it is to be observed, on the other hand, that the language of the clause *65] is *altogether silent as to personal injury. It speaks of the vessel insured running down or damaging any other ship or vessel, and of the assured thereby becoming liable to pay damages. It seems to us

that the more reasonable construction is to consider the damages herein referred to as limited to such damages as shall be payable in respect of the loss of or damage done to the ship run down or damaged, or, possibly, as extending to her freight or cargo, which for this purpose may perhaps be treated as part of herself.

This view becomes very materially strengthened when it is considered that the present is a policy of marine insurance, and that hitherto policies of marine insurance have never been applied to the purpose of insurance against loss of life, or indemnity in respect of personal injury, arising from perils of the seas. This being so, it appears to us more reasonable, in the absence of express agreement, to limit the general language of the clause to those matters which have alone been the subject of marine insurance.

And it is to be observed that the clause provides not only for damage occasioned by negligence, but also for damage arising from accident, the latter provision being probably introduced to meet the possible case of the vessel becoming subject to a foreign jurisdiction in a country by the maritime law of which, in case of accident, the damage is to be divided. Now it is clear that the shipowners never could be liable for damages for loss of life or personal injury arising from accidental collision. Their liability to such damages depends on the relation of master and servant between them and those whose negligence occasions the death or personal injury, and the running down or damaging the other ship is only *material in so far as it may connect the death or personal injury with that negligence. By providing in the same sentence [*66 for the case of accident, as well as for that of negligence, the parties would appear to have been looking to what might become payable in respect of damage to the ship, not to those on board of her, who never could have any claim in respect of injury arising from accident.

There is a further circumstance deserving of notice. By the terms of the policy, the liability of the underwriters is limited to such proportion of three-fourths of the sum paid as the 4000*l.* assured bears to the value of the ship insured and her freight. Now this must be taken to mean the actual value of the ship and freight. But, by the express proviso of the 504th section of the 17 & 18 Vict. c. 104, in no case where liability is incurred in respect of loss of life or personal injury to any passenger shall the value of any ship and freight be taken to be less than 15*l.* per registered ton. The absence of any reference to this special provision in the case of damage arising in respect of loss of life or personal injury tends strongly to show that the parties were contemplating the case of damages paid in respect of loss of or damage to the ship and her appurtenances, as to which the statutory enactment as to value would not apply.

We regret that in coming to this conclusion we find ourselves in conflict with the decision of the Court of Session in the case of *Coey v. Smith*, 22 Court of Session Cases 955, to which our attention was called on the argument. The words in the policy in that case are not indeed identical with those occurring in the present, but we think they are in substance the same, and it is therefore with very great *reluctance [*67 that we find ourselves compelled to differ from a Court whose decisions, although not binding on us, are entitled to the highest consideration at our hands. But after the best consideration we have been able

to give to the case, we cannot arrive at any other conclusion than that the view taken by the Lord Ordinary in that case was the right one, namely, that on such a clause as the present occurring in a policy of marine insurance the liability of the insurer does not extend to damages paid by the assured in respect of loss of life or personal injury.

Our judgment will therefore be for the defendant.

Judgment for the defendant.

THE DUKE OF MARLBOROUGH v. OSBORN. Feb. 11.

Agricultural lease.—Stipulation.—Forfeiture.—Team-work.

An agreement for an agricultural lease contained a stipulation that the tenant should perform each year for the landlord, "at the rate of one day's team-work with two horses and one proper person for every 50*l.* of rent when required (except at hay and corn harvest) without being paid for the same. In ejectment for a forfeiture, Held,

1. That the work thus to be performed meant any work for which teams are generally used, and therefore included drawing coals to B. Palace. Per Cockburn, C. J., Wightman, Blackburn, and Mellor, JJ.

2. That the tenant was not bound to supply a cart or other vehicle for the purpose of the work: per Crompton and Blackburn, JJ.; dissentiente, Mellor, J.

EJECTMENT by landlord for forfeiture under a stipulation in an agreement for an agricultural lease.

On the trial, before Byles, J., at the Summer Assizes for Oxfordshire in 1863, it appeared that the agreement in question bore date in November, 1855, and the defendant had ever since been in possession.

*68] The *clause under which the forfeiture was claimed was as follows:—

"The tenant to perform each year for the Duke of Marlborough at the rate of one day's team-work with two horses and one proper person for every 50*l.* of rent when required (except at hay and corn harvest) without being paid for the same."

In pursuance of this the agent of the landlord, on the 23d May, 1863, served the tenant with a written notice, requiring him to "send a cart and two horses, with a proper driver," to such a place on such a day and hour, "and to perform with them one day's team-work, by drawing coals from thence to Blenheim Palace." The tenant did not comply with this notice, and the present action was therefore brought.

The jury having found for the plaintiff,

Huddleston, in Michaelmas Term, 1863, November 2d, moved to enter a nonsuit or a verdict for the defendant.—No forfeiture has been incurred here. First. The team-work contemplated by the instrument sued on was team-work connected with agriculture, not team-work for domestic purposes, such as drawing coals. [COCKBURN, C. J.—Was there any extrinsic evidence of the meaning of this instrument?] None. [COCKBURN, C. J.—If the plaintiff could not get the defendant's team to draw those coals he must have employed his own.] Secondly. The defendant was only bound by the stipulation to provide two horses and a proper driver for the purpose of doing team-work; he was not bound to supply a cart or other vehicle for the purpose, as required by this notice. [He cited Flügel's German and English Dictionary and Webster's Dictionary, voc. Team.]

**Per CURIAM.* (COCKBURN, C. J., WIGHTMAN, BLACKBURN and MELLOR, JJ.)—There ought to be no rule on the first point. [*69] The expression “team-work” is applicable to anything for which teams are generally used. But on the second point there ought to be a rule.

Rule nisi on the second point.

The rule was argued at the present Sittings on the 9th and 11th February, and judgment given on the latter day.

Gray and *Cripps* showed cause.—First. The word “team” means a number of horses yoked and working together. It is one of the oldest words in the language; for Cæsar, describing the mode of chariot fighting among the ancient inhabitants of Britain, says: “tantum usu quotidiano et exercitatione efficiunt, uti in declivi ac præcipiti loco incitatos equos sustinere, et brevi moderari ac flectere, et *per temonem percurrere*.” (a) According to Johnson’s Dictionary, “team” comes from *temo*, the team of a carriage, Latin; cyme, Saxon, a yoke. From the former comes the French “timon.” [They also referred to Walker’s Dictionary.] [BLACKBURN, J.—Wordsworth uses the word thus:—

“Yes, let my master fume and fret,
Here am I—with my horses yet!
My jolly *Team*, he finds that ye
Will work for nobody but me.”

The Wagoner, Canto I.]

A team of counsel means a number of counsel following one after another. In *Gray* also we find:—

“How jocund oft they drove their *teams* afield.” (b)

*[CROMPTON, J.—There is the following old epigram:—

[*70]

“Giles Jolt as sleeping in his cart he lay,
Some waggish pilferers stole his *team* away.
Giles wakes and cries, ‘What’s here, odds Dickens, what?
Why how now, am I Giles or am I not?
If he, I’ve lost six geldings to my smart,
If not, odds buddikins! I’ve found a cart.”

Elegant Extracts, vol. iv., p. 296, Lond. 1791.

Here the team is evidently divided from the cart.]

Stat. 5 & 6 W. 4, c. 50, to consolidate and amend the laws relating to highways, &c., s. 85, enacts, that it shall be lawful for the rate-payers keeping “a team or teams of two or more horses or beasts of draught” to divide among themselves, in proportion to the amount of rate to which they may respectively be assessed, the carrying of the material which may be required, &c., for the repairs of the highways. And, by sect. 46, no surveyor is allowed upon his own account, directly or indirectly, to use or let to hire any “team,” unless a license be first obtained from two justices. If “team” there does not include the cart, the surveyor could let the cart.

Secondly. The parties to this agreement have sufficiently expressed their intention that the tenant is to supply the landlord with a vehicle as well as horses. A person who undertakes to do a thing absolutely must find everything necessary for doing it. Thus, a man who contracts to ride to York for another, must provide himself with a horse; or who

(a) De Bell. Gall. lib. 4, c. 38.

(b) Elegy in a Country Churchyard.

contracts to ascend in a balloon for another, in order to make an experiment, must find a balloon. There is indeed an exception where a man is prevented from performing his covenant *actu Dei*; as where he covenants to leave on his farm all the trees he finds there, and some of them are blown down during the tenancy. This agreement does not indeed *71] mention a *vehicle, but neither does it make any mention of harness, and it will scarcely be contended that the tenant is not bound to supply that. Even if no mention had been made of the horses and man, the expression that the tenant shall perform team-work implies that he shall furnish them. It may be urged that as the agreement imposes on the tenant the duty of finding horses and a man, making no mention of a vehicle, the maxim "*Expressio unius est exclusio alterius*" applies. But it was necessary to mention the former to define the extent of the service. The other side wish to add to the covenant that something is to be done by the landlord. It may, however, fairly be presumed that a farmer has carts, but not that a Duke has; and consequently if it were meant that the Duke should supply the cart that should have been expressed.

Huddleston and *Griffiths*, in support of the rule.—A strict construction ought to be put on this instrument, seeing that it involves the forfeiture of a farm. Team-work means work done by horses or other animals working in a line. It may be done without a cart or any other vehicle; and if the landlord has a right to require the tenant to supply a cart, he would have an equal right to require him to supply a watering-cart, or a harrow, or even a steam threshing-machine. [CROMPTON, J.—Would not two horses working abreast be a team?] Johnson, in his Dictionary, defines "Team" thus.—"1. A number of horses or oxen drawing at once the same carriage," and the following are some of the authorities he cites for this:—

" We fairies, that do run
By the triple Hecate's team,
*72] *From the presence of the Sun,
Following darkness like a dream,
Now are frolic.—*Shakesp. Mids. Night's Dream.*

I am in love; but a *team* of horse shall not pluck that from me, nor who 'tis I love.—*Shakesp.*

He heaved with more than human force to move
A weighty stone, the labour of a *team*.—*Dryden.*"

[BLACKBURN, J.—Shakespeare describes Queen Mab as "drawn with a *team* of little atomies." (a)] "2. Any number passing in a line.

Like a long *team* of snowy swans on high,
Which clap their wings, and cleave the liquid sky.—*Dryden.*"

In Todd's edition of Johnson there is also the verb "To team," to join together in a team. So in Webster's Dictionary, "Team. [Sax. *ceam*, offspring, progeny, race of descendants, hence a suit or long series; cyman to *teem*, to bear, to bring forth, also to call, to summon. The primary sense is to shoot out or extend.] 1. Two or more horses, oxen or other beasts harnessed together to the same vehicle for drawing, as to a coach, chariot, wagon, cart, sled, sleigh and the like. It has been a great question whether *teams* of horses or oxen are most advantageously employed in agriculture. In land free from stones and stumps

(a) *Romeo and Juliet*, act 1.

and of easy tillage, it is generally agreed that horses are preferable for teams. 2. Any number passing in a line; a long line, &c. [*This is the primary sense, but is rarely used.*] And "Team-work [*team and work*] work done by a team, as distinguished from personal labour." Richardson, in his Dictionary, says that according to Somner "a litter of *pigs was called a team." [They also referred to Bosworth's Anglo-Saxon and English Dictionary and the Dictionaries of [*73 Ash, Sheridan and Walker.]

CROMPTON, J.—I have had very considerable doubt about this matter, and thought at one time that the plaintiff had made out his case. But I have now come to the conclusion that the cause of forfeiture is not so clearly expressed in the agreement under which the defendant holds that we ought to say, here has been a breach of it, and consequently a forfeiture. In order to give such an effect we must see that the case is brought distinctly within the stipulation.

Mr. *Gray* and Mr. *Cripps* put their argument on two grounds. The first they do not make out to my satisfaction, namely, that the word "team" implies, besides horses, a cart or vehicle of some kind. I think that according to the modern use of the word it does not. Thus you speak of the team a man worked a coach with, and if the word "team" were confined to lines of animals a line of pigs would afford a ludicrous instance. I think it probable that they have given the correct etymology of the word, from temo, timon, beam or pole, but it has not that signification now, and means horses or other animals. At all events, I should not be inclined to think a vehicle so clearly implied in "team" as to mean that it must be part of it.

But the second part of the argument of Mr. *Gray* and Mr. *Cripps* struck me for a long while, i. e. that as here is an express provision that the tenant shall perform for the landlord in each year "one day's team-work with two horses and one proper person," this is an absolute undertaking to perform team-work, and *we are not allowed to put [*74 words into the instrument to make a condition precedent, namely, that the landlord is to find carts for the work, unless that intention is clearly deducible from it. By the expression "team-work," what work is meant? It means that the tenant shall send his horses and his man to the spot indicated, and there do what work they are put to. Some words must be inserted in this stipulation to make it sensible. Where a man covenants to build a house, he must perform the covenant. But here, from the very nature of the stipulation, it is agreed, although not said, that there must be something which the landlord sets the tenant to do, that he must point out to what work the team is to be applied. It is not as if the tenant had engaged to carry home coals, then he must have done it; and the argument of the plaintiff's counsel would be perfect. So, if the stipulation were that he should plough three acres, he must do it at his own hazard. But when it is, "I will work with my team for you so many days," he is to be set to work by the landlord. Now does that include that he must bring a cart or other vehicle? I thought so at first, and that the obligation was limited by the number of horses and one driver, and perhaps was applicable to mere agricultural work. The Court have decided that it is not applicable to agricultural work only, but to that decision I was not party. Take the common case (clearly within the agreement) of team-work with ploughing, it

never could be intended that the man should bring his plough, which might perhaps be some miles off. So, of harrowing, a man could hardly be expected to bring a harrow. That may be to some extent a reason (if the question should ever be discussed) whether the argument about *75] drawing coals is not in *favour of the defendant. But taking the stipulation even with reference to things not strictly applicable to agriculture, it is not an unreasonable construction that he is to bring horses and do team-work. One kind of work is on timber; you must put his team to draw any timber that two horses could draw, and it can never be supposed that clamps are to be brought by the tenant. We must apply the same construction in one as in the other; if it is admitted that the stipulation means that he shall supply a cart in the one case he must supply the machine to which the team is applied in the other. But the stipulation is sufficiently answered by holding that the tenant does enough if he sends team and driver for any purpose to which the landlord may put them. He has the option to say, "Send your horses here with a driver, put your team to the plough," or, "put your team to the clamps," but the stipulation does not necessarily mean that the tenant must send a cart. It is to be lamented that this instrument is not more precise.

BLACKBURN, J.—This rule must be made absolute on the ground that under the circumstances there was no breach of the stipulation in the agreement, and consequently no forfeiture. I agree with the plaintiff's counsel that, as a general proposition, when a party has contracted absolutely to do a thing he must do it, and all things necessary for the purpose must be furnished by him. But when, from the nature of the thing to be done, it is essential that the other party point out how the things furnished are to be applied, he must point it out in a state fit for the application of those things. For instance, the vendor of goods contracts to deliver them free on board ship in the river, the vendor *76] must *find lighters or barges to put them on board, but before he can do so the other party must name a ship in a reasonable place, for it is not stipulated that the vendor shall find a ship. Apply that principle here. If the effect of this stipulation is that the tenant is to plough, or carry coals, to the extent of the power of two horses; having undertaken to do that, he must furnish the instruments to do it, and the horses are named in the agreement to show the number to be sent and the amount of work to be done. But if the meaning is only that he will furnish two horses and a proper team, which I think means two horses harnessed for the purpose of drawing, and also a proper person, to do such work as shall be proper for a team to do, before he can do that the landlord must point out what is to be done. The landlord may say to the tenant, "Employ your team to break up that field;" the farmer may say, "I will do so, but there must first be a plough in the field to which I can fasten my team." Or the landlord may say, "Take that timber from the wood and draw it out with your team;" the tenant has no right to say, "I will not," but he may say, "you must put a chain and clamps." Or if the landlord says, "Draw home my hay," the tenant may say, "I will not draw it unless you put it into a cart." So here the plaintiff has a right to say, "Employ your team to draw coals," but the tenant has a right to say, "I cannot unless the coals are put in a cart or other vehicle, so that the team may draw it." I

therefore think that this stipulation was not broken, as the plaintiff has not put the coals into a drawable (a) state. As to the attempt to found an argument on The *Highway Act (5 & 6 W. 4, c. 50, ss. 35, [*77 46), that statute merely speaks of a man who has got a team, and no more says that a cart is part of the team than that it is part of the horses.

MELLOR, J.—I confess I retain the opinion which I originally held, namely, that on the true construction of this instrument the tenant was bound to provide the necessary things to do team-work. The stipulation must be read as if it had stopped at “team-work,” and then what is there to show that it meant horses more than cart or plough? It is possible that the plaintiff, although a Duke, may not have a plough; a stockbroker who has a farm might let it, and contract that the tenant should do a day’s team-work. I think the subsequent words in the covenant are only used to measure and limit the extent of the work; if the stipulation stopped at “team-work” it might have meant that four or five horses were to be supplied. The tenant undertakes to perform “team-work.” The landlord must give directions what work is to be done; but is not bound to do more than that. If the tenant had agreed only to furnish two horses and a proper driver, and left to the Duke to supply everything else necessary to make them useful, it would be different; but here the tenant, without specifying anything to be done by the landlord, says he will do a day’s team-work; and if that was meant to be limited to furnishing the horses, it ought to have been so expressed. As, however, my brothers Crompton and Blackburn have come to an opposite opinion, I express mine with great diffidence.

Rule absolute to enter a nonsuit.

(a) Drawable, capable of being drawn. Webster’s Dict., by Goodrich and Porter, 1865.

*GANDY and Wife v. JUBBER. Feb. 11. [*78

Nuisance.—Liability of reversioner.—Tenancy from year to year.

1. The owner of a messuage and premises, attached to which was an area, let the same to a tenant from year to year, and died; having devised the property, with an iron grating over the area improperly constructed and out of repair so as to amount to a nuisance, to the defendant. The defendant, having no notice of the nuisance, suffered the tenant to remain in the occupation of the premises, upon the same terms as before, receiving rent. The wife of A. having sustained damage by reason of the dangerous condition of the grating: held that the defendant, as reversioner, was liable to an action for the damage thereby occasioned.

2. A tenancy from year to year is not, at least for the purpose of such an action, to be treated as a continuous tenancy, but as recommencing every year.

THE first count of the declaration was similar to the third (hereafter set forth), but alleging one of the terms of the tenancy to be that the defendant as landlord should keep the messuage and area or cellar and the grating in good repair.

The second count was similar to the first, but alleging damage to the husband only.

Third count. That several years before and continually up to and at the time of the happening of the grievance and injury next hereinafter mentioned, a certain messuage and an area or cellar in front of the messuage, and adjoining the same, and which area or cellar was then covered and protected by an iron grating, were in the occupation of Ann Page

as tenant thereof to the defendant from year to year, the reversion thereof then belonging to the defendant, and the tenant was not by the terms of the tenancy under *any contract or liability to alter or *79] repair, or keep in repair, the messuage, area or cellar, or the iron grating; and the messuage was then near to a certain common and public footway, and the area or cellar was then near to and under the footway; and it was then necessary and proper that the iron grating should be so constructed and kept in good and sufficient repair that persons lawfully using and passing along the footway might not be in danger of falling or passing through the iron grating, or into the area; and the iron grating had been, and was, for several years of the tenancy before and continually up to and at the time of the happening of the grievance and injury hereinafter mentioned, in a dangerous state, and in a bad and insufficient state of repair; so that persons lawfully using and passing along the footway had been and were in danger of falling or passing through the iron grating, and into the area; and after and whilst the same was in such dangerous state, and in bad and insufficient repair, the defendant might as such landlord and reversioner have lawfully determined the tenancy by his own sole act and deed, so that the same might and would have been determined before the happening of the grievance hereinafter mentioned; yet the defendant did not determine the tenancy, but suffered and allowed the same to continue, and suffered and allowed Ann Page to remain tenant of the messuage and area or cellar without being under any contract or liability, by the terms of the tenancy, to alter or repair the said grating; and the defendant wrongfully and negligently allowed the iron grating to be and continue in such a dangerous state, and in bad and insufficient repair, up to and at the time *80] of *the happening of the grievance and injury hereinafter mentioned; and by reason of the premises, whilst the plaintiff Susannah, then being the wife of the plaintiff David, was lawfully using and passing along the footway, one of her legs passed through the iron grating into the area or cellar, whereby she was wounded and became sick and ill, and for a long time suffered great pain of body, and distress and anxiety of mind, and was lamed and permanently disabled.

The fourth count was the same as the third, but alleging damage to the husband only.

The fifth count repeated all the allegations in the third count, and added that before the grievance, whilst the defendant might have determined the tenancy, he had notice of the iron grating being in a dangerous state and in bad and insufficient repair.

Sixth count, the same, alleging damage to the husband only.

The defendant pleaded, first, to the whole declaration, not guilty. Secondly, to the first and second counts, a traverse of the tenancy being on the terms alleged. Thirdly, to the third, fourth, fifth and sixth counts, a traverse of the allegation that the tenant was not by the terms of the tenancy bound to alter or repair, &c. Fourthly, to the same, that the defendant could not determine the tenancy, as alleged. Fifthly, to the fifth and sixth counts, a traverse of the notice. Sixthly, that it was not necessary that the grating should be so constructed and kept in repair as alleged.

Issues thereon.

There was also a demurrer to the third and fourth counts, and a joinder in demurrer.

*At the trial, before Bramwell, B., at the Surrey Summer Assizes, 1863, it appeared that on the 21st August, 1862, the female plaintiff had been conversing with a neighbour, Mrs. Page, the occupier of the house No. 30, Leigh Street, Burton Crescent, who was standing at the door of her house, and that, on turning round to leave, the female plaintiff's foot and leg up to the knee slipped through an iron grating belonging to the house, and she was greatly hurt and permanently lamed. The bars of the grating, which was over the area of the house, close to the footpath, with no protection between the grating and the footpath, were horizontal and at right angles to it. They were in some parts two inches and three quarters, and in others three inches apart, and some of them were shrunken, rusty and loose in their sockets. The house was let to Mrs. Page's husband, by a Mr. Ward, the then owner, about 1853. There was no evidence of any written lease or agreement or of any special terms of letting. The rent was paid quarterly, and the landlord had from time to time done necessary repairs. In 1859 Ward died, having devised the house to the defendant in trust. In 1860 Page died, and his widow continued to occupy and paid rent to the defendant, who continued to do occasional repairs. There was no evidence as to when the grating was placed over the area, but it had been in a dangerous state for certainly five years before the accident; although it did not appear that the defendant had knowledge or notice of this. [*81]

On this evidence the defendant's counsel, without calling witnesses, submitted that the issues on the second plea, and on the third plea as to the fifth and sixth counts, should be found for the defendant; and that, inasmuch as *no evidence of any special terms of tenancy was given, the issue on not guilty to the third and fourth counts must be found for him. The learned Judge was of opinion that the plaintiff's case failed except on the third and fourth counts, and upon those counts he asked the jury whether the condition and position of the grating were dangerous to foot-passengers, and directed them that, if so, it would be a nuisance although not actually on the footway. The jury found that the grating was dangerous for foot-passengers, and a nuisance both from the faultiness of its construction and from want of repair, and assessed the damages at 65*l*. [*82]

On this finding, the learned Judge directed a verdict for the plaintiffs on the plea of not guilty to the third and fourth counts. It was agreed that there should be a verdict for the plaintiffs on the third, fourth and sixth pleas, and on the other pleas for the defendant, and leave was reserved to the defendant to move to enter a nonsuit.

In Michaelmas Term, 1863, a rule nisi was accordingly obtained to enter a nonsuit on the ground that, there being no evidence of any special terms of tenancy, the verdict of not guilty ought to have been for the defendant; or for a new trial on the ground that the verdict was against the evidence, the grating not being a nuisance to the highway.

G. Shaw showed cause.—The question is, whether the allegation in the third count, that the defendant “wrongfully and negligently” allowed the iron grating to be and continue in a dangerous state, was made out; or in other words, whether the defendant as reversioner is answerable for the dangerous state of the grating, by *reason [*83]

whereof the injury to the female plaintiff arose. It is clear that the nuisance was of long standing, and it was the duty of the defendant, as reversioner, to have taken the necessary steps for terminating the tenancy if the nuisance could not be otherwise abated. [CROMPTON, J.—It may be that the nuisance had its origin in the default of the tenant. In *Reg. v. Stannard*, 1 Leigh & Cave C. C. 849, it was held that the owner of a house, letting it out in apartments to female tenants, who used their respective rooms for the purpose of prostitution, over whom he had no control beyond the power, as landlord, of determining the tenancies, was not indictable for keeping a disorderly house. MELLOR, J.—There the landlord had notice of the purpose for which the tenants took the apartments, but in the present case it does not appear that the defendant had notice of the unsafe condition of the grating.] The absence of notice to the defendant affords no answer to the action; besides which this nuisance was of a permanent character, not resulting from any particular mode of using the premises by the tenant. This was a yearly tenancy: such are treated by Patteson, J., in *Tomkins v. Lawrance*, 8 C. & P. 729 (E. C. L. R. vol. 34), as recommencing every year; and to the same effect is the judgment of Wood, V. C., in *Cattley v. Arnold*, 1 John & H. 651, 658, citing *Tomkins v. Lawrance*. In *Rosewell v. Prior*, 2 Salk. 460; 1 Ld. Raym. 713 (see also 6 Mod. 116, 12 Id. 215, 635), where a tenant for years of a piece of ground erected a nuisance which obstructed his neighbour's lights, and afterwards underleased the premises, it was held that an action *84] would lie against him for the *obstruction, after the demise. In *Todd v. Flight*, 9 C. B. N. S. 377 (E. C. L. R. vol. 99), it was held that an action lies against the owner of premises who, having demised them to a tenant in a ruinous and dangerous condition, permits them so to remain until by reason of the want of reparation they fall and cause damage to an adjoining owner. And in *Rex v. Pedly*, 1 A. & E. 822 (E. C. L. R. vol. 28), it was held that if the owner of land erects a building which is or is likely to become a nuisance, and then lets the land, he is liable to an indictment for such nuisance being continued or created during the term. There, in delivering his judgment, Littledale, J., p. 827, puts this very case:—"If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability: yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable"—which reasoning is cited and approved by the Court of Common Pleas in a considered judgment in *Rich v. Basterfield*, 4 C. B. 783 (E. C. L. R. vol. 56). Most of the above cases are cited in Woodfall's *Landlord and Tenant*, 8th ed., by Cole, pp. 734-735. *Barnes v. Ward*, 9 C. B. 392 (E. C. L. R. vol. 67), also shows that while the grating continued in a dangerous state it was the duty of the defendant to have fenced it, or taken such other precautions as might be necessary for the *protection of the public. *85] *Russell v. Shenton*, 3 Q. B. 449, may be relied on, but is distin-

guishable, for it was decided on the ground that *prima facie* there is no obligation on a landlord to keep cleansed the drains which occasion a nuisance. Further, in this case, repairs had from time to time been done to the premises in question by the owner, from which the inference is strong that the duty of repair lay upon him and not upon the tenant: *Payne v. Rogers*, 2 H. Bl. 350.

Kaye, in support of the rule.—The defendant is not liable. He had no notice of the dangerous state of the grating, nor is there evidence as to the origin of the nuisance. [BLACKBURN, J.—In *Reg. v. Watts*, 1 Salk. 357, it was held that an indictment lay against a tenant at will for suffering a house to stand upon the highway in a dangerous condition and likely to fall.] There is no liability cast upon a reversioner under circumstances like the present. Of late tenancies from year to year have been considered as continuing tenancies, each succeeding year being treated as a prolongation of the original term: *Woodfall's Landlord and Tenant*, 8th ed., by Cole, p. 167. This then, being a tenancy from year to year, is a continuing tenancy, and in *Rich v. Basterfield*, 4 C. B. 783 (E. C. L. R. vol. 56), the court held that liability for injuries arising from acts done upon property attaches only to the parties in actual possession. Here it was not the defendant who let with the nuisance in existence, assuming it to have been in existence at the time of the original letting, of which there is no evidence. It seems to have been tacitly *admitted, in *Bishop v. The Trustees of the Bedford Charity*, 1 E. & E. 697 (E. C. L. R. vol. 102),^(a) that the defend- [*86 ant, in a case like the present, would not have been liable without notice of the dangerous state of the premises at the time of the demise, and the judgment in *Todd v. Flight*, 9 C. B. N. S. 377, 390 (E. C. L. R. vol. 99), proceeded upon the ground that the defendant had such notice. It would be a serious hardship upon a man if, by becoming reversioner, he is rendered liable without express knowledge in respect of a pre-existing nuisance. [CROMPTON, J.—Here the defendant has received rent for the premises with the nuisance thereon existing ever since his interest in them began. BLACKBURN, J., referred to *Chauntler v. Robinson*, 4 Exch. 163.]

CROMPTON, J.—I am of opinion that this rule should be discharged. It was moved partly on the ground of the verdict being against the evidence, but chiefly on the ground of misdirection. So far as regards the former, it appears that my brother Bramwell, who tried the cause, is not dissatisfied with the verdict; but the point as to misdirection, notwithstanding that we have had the advantage of hearing it well and learnedly argued, remains one of difficulty. The question arises out of the cause of action as stated in the third count of the declaration, which was founded upon special facts creating an alleged breach of duty by the owner of the premises; and we have to consider whether a duty and a consequent misfeasance on the part of the defendant is made out on those facts; for if this be not so, the mere allegation in the declaration of the wrongful permission by the defendant will not avail the plaintiff.

*Looking then at the whole case, I am of opinion that the arguments of Mr. *Shaw* are well founded, and that my brother Bram- [*87 well was right in directing a verdict for the plaintiff upon the plea of not guilty to the third count. We have it upon authority that from the

(a) s. c. on appeal, 1d. 714.

earliest times the owner of land, if occupier, was bound so to keep it as not to be a nuisance. In *Reg. v. Watts*, 1 Salk. 357, it was held that a tenant at will was answerable for continuing a house in a ruinous and dangerous condition, and it certainly seems hard that if a man lets his premises, and so divests himself of all power of control over them, he should be made liable for the default of the tenant. The owner ought not to be liable for subsequent nuisances which did not originate with himself, and which he cannot prevent—for these so long as the tenant is in possession the owner is irresponsible. But it was held in *Rosewell v. Prior*, 2 Salk. 460, 1 Ld. Raym. 713,^(a) that, if a man lets or relets his land with a nuisance upon it, he is responsible for such nuisance, notwithstanding the tenancy. No doubt there was notice of the existence of the nuisance in that case, although such does not in terms appear, the rather perhaps as notice was not there the foundation of the liability. But to bring liability home to the owner, the nuisance must be one which is in its very essence and nature a nuisance at the time of the letting, and not merely something which is capable of being thereafter rendered a nuisance by the tenant. The owner, then, being liable for nuisances and obstructions in existence at the date of the demise, it seems clear that he would be equally responsible for reletting *88] the premises with the nuisance upon them, and in this I see no hardship, notwithstanding the absence of notice to him; indeed, on the other hand, there would be hardship on the tenant in making him liable for a nuisance existing on premises which he might have taken for a short period only. I think therefore that it is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on the premises at the date of the demise; and this brings us to the important question in this case, viz., whether what took place was equivalent to a reletting, or, in other words, whether a landlord having the power of giving notice, and not exercising it, is to be held as thereby reletting? It seems to me that such would be equivalent to a reletting. It certainly appears that in many cases a tenancy from year to year has been treated as a continuing tenancy; but, on the other hand, Patteson, J., expressly says, in *Tomkins v. Lawrence*, 8 C. & P. 729, 731 (E. C. L. R. vol. 34), that a tenancy from year to year is to be considered as recommencing every year. I take it to be clear, then, that where a tenant having a long lease of premises so uses them as to create a nuisance, the landlord, having no power or right of interference, incurs no responsibility; but if having regained possession of the property the landlord relets it with the nuisance thereupon remaining, in such case he is liable; and for this *Rex v. Pedly*, 1 A. & E. 822, is an authority. There Littledale, J., says, p. 827, “If, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability: yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, *89] that would make the landlord liable. He is not to let the land with the nuisance upon it. Here the periods are short, so that there has been a reletting; and that has taken place after the user of the buildings had created the nuisance. This, therefore, is a case in which the reversioner is liable.” In the subsequent case of *Rich v.*

(a) See also 6 Mod. 116; 12 Id. 215, 636

Basterfield, 4 C. B. 783 (E. C. L. R. vol. 56), Cresswell, J., in delivering the judgment of the Court of Common Pleas, p. 804, cites the above judgment of Littledale, J., with approbation, and takes the opportunity of expressing his dissent from the views of Taunton, J., in the same case. The present case, then, seems to me to fall within the principle of that ruling of Littledale, J. The landlord receives rent under a yearly tenancy, and his permitting the tenant to remain in occupation year after year without taking steps for the termination of the tenancy is, I think, equivalent to a new letting at the termination of each year. I do not say that the case is altogether free from doubt; but I think the authorities justify us in the view we have taken of the question.

BLACKBURN, J.—I am of the same opinion. The question appears to be, whether enough of the breach of duty alleged in the third count was proved to enable the plaintiff to retain his verdict upon the plea of not guilty. The third count must be taken as containing an averment that the nuisance was kept and maintained by the reversioner, for such is the effect of the averment that he continued it by reason of neglecting to determine the tenancy, as he might have done, “by his own sole act and deed;” that is, by giving the requisite notice; and if this does not afford a substantial *cause of action, the verdict must be for [*90 the defendant. The question therefore is, whether the defendant, as reversioner, is, under the circumstances, liable. Now that a reversioner, as such, is not responsible for a nuisance existing on premises in the occupation of another, appears from the judgment of Parke, B., in *Chauntler v. Robinson*, 4 Exch. 163. But in *Rosewell v. Prior*,^(a) the case, according to the report in 2 Salk. 460, was thus:—“Tenant for years erected a nuisance, and afterwards made an underlease to J. S. The question was, whether after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an underlease? Et per Cur. It lies; for he transferred it with the original wrong, and his demise affirms the continuance of it: He hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions. * * * Receipt of rent is upholding.” This doctrine must however be received with some qualification; it must be shown that there has been a demise or redemise of the land, with the nuisance existing upon it; and the nuisance must be, if I may so term it, a normal one; not such for instance as a cellar with a flap, which may be or not a nuisance, according as it is carefully closed or improperly left open. The distinction is well pointed out in *Rich v. Basterfield*, 4 C. B. 783 (E. C. L. R. vol. 56), where the Court held that the owner of premises demised to a tenant is not responsible for a nuisance occasioned by the smoke of a chimney, which the tenant might or might not use so as to create a *nuisance. In the present case a normal nuisance existed upon [*91 the premises before the defendant, as reversioner, had anything in them. He might, if he pleased, have terminated the tenancy, and with it the nuisance; and, not having done so, I think the law, as laid down by Patteson, J., in *Tomkins v. Lawrance*, 8 C. & P. 729 (E. C. L. R. vol. 34), that a tenancy from year to year is to be treated as recommencing every year, is applicable to the case, which is thus brought within the principle of *Rosewell v. Prior*, 2 Salk. 460, 1 *Ld.*

(a) Also reported 1 *Ld. Raym.* 713. See also 6 *Mod.* 116, 12 *Id.* 215, 635.

Raym. 713.(a) Much perhaps might be said on both sides of the question whether the not giving of notice to terminate a tenancy is equivalent, for the purposes of the present argument, to a reletting. It is certainly curious that there should be no decisions directly bearing upon the point; the passage from the judgment of Littledale, J., in *Rex v. Pedly*, 1 A. & E. 822, 827 (E. C. L. R. vol. 28), being in fact the only authority casting any light upon the precise question to which we have been referred. There, though it was unnecessary for him to have put the case of a tenancy from year to year, that learned Judge seems to have done so from a conviction that, if such a tenancy were suffered to continue, it was practically the same thing as the renewal of a tenancy for a short period; and this opinion, emanating from so cautious and learned a Judge, must be accepted as law.

MELLOR, J.—I also am of opinion that this rule should be discharged. It is unquestionably the duty of the owner of premises to let them free from nuisance; and if he does so, and the tenant enters into possession *92] and *subsequently creates one, he and not the landlord is liable, so long at least as the landlord is unable to regain possession of the premises, and thereby be enabled to abate the nuisance. But here was evidence of the existence of this nuisance for several years, and that the dangerous state of this grating was due as much (or more) to the faultiness of its construction as to want of repair. It seems then that, inasmuch as the tenancy was one from year to year, the landlord might, by giving the proper notice, have regained possession of the premises and suppressed the nuisance; and probably, if he had given the tenant notice, explaining his object in doing so, the tenant might himself have abated it. So far from that, he continues the tenancy and receives rent, thereby, as it appears to me, confirming not only the tenancy but the nuisance. We have therefore to deal with the question whether, this being a tenancy from year to year, that which transpired amounted to a new demise, and in my opinion it had that effect. Consequently the defendant, having in his hands a power which he might and should have exercised, must be held responsible for the consequences of not having done so. Rule discharged.(b)

The demurrer to the 3d and 4th counts came on to be heard in Trinity Term, 1864, on the 3d June, before COCKBURN, C. J., CROMPTON and BLACKBURN, JJ.

*93] *Mellish*, who appeared for the defendant, admitted *that the point had been decided against him by the proceedings on the rule.

G. Shaw was to have argued for the plaintiffs.

Judgment for the plaintiffs.(c)

(a) See also 6 Mod. 166; 12 Id. 215, 635.

(b) This case is reported by C. W. Lovesy, Esq. An appeal is pending.

(c) Error is pending.

IN THE EXCHEQUER CHAMBER.

MARY GRIFFIN *v.* DIGHTON and DAVIS. *Feb. 3.**Lay rector.—Vicar.—Churchwardens.—Possession of parish church.*

1. The doctrine laid down by Sir J. Nicholl, in *Jarratt v. Steele*, 3 Phillim. 167, 169–170, “that the possession of the church is in the minister and the churchwardens;—and that no person has a right to enter it when it is not open for Divine service, except with their permission, and under their authority,” holds in the temporal as well as in the Ecclesiastical Courts: per Erle, C. J., Williams and Willes, JJ., and Channell, B.; affirming the judgment of the Queen’s Bench, consisting of Cockburn, C. J., Crompton, Blackburn, and Mellor, JJ.

2. In a parish where there is both a lay rector and a vicar, the rector has no right to prevent the vicar having access to any part of the parish church by any of its doors. *Id.*

THE declaration alleged that the defendants broke and entered a certain close of the plaintiff, that is to say, the chancel of the parish church of the parish of Dixton, in the county of Monmouth, and damaged and broke the door of the chancel, and took away the lock fixed to the door and affixed another lock to it, and with a key locked the last-mentioned lock.

Plea. Except as to taking away the lock after the same had been taken off from the door, that before and at the time of the committing of the trespasses the defendant Dighton was the vicar and incumbent and *the officiating minister of the parish church in the declaration mentioned, and the defendant Davis was one of the church- [*94 wardens of the parish therein mentioned: and that before the committing of the alleged trespasses there was only one lock on the door and only one key to the lock; and the plaintiff kept the key in her possession, and with the same locked and fastened the door, and, except during the period and between the hours of Divine service on Sundays, kept the door so locked and fastened, and, although requested by the defendant Dighton so to do, wrongfully and improperly refused to permit him, as and then being such vicar, incumbent and minister, to have a key to the lock, and thereby prevented him from having access and egress to and from the chancel through the door at such reasonable times as he, as such vicar, incumbent and minister, was entitled to have; and the plaintiff on several occasions, whilst the defendant Dighton, as such vicar, incumbent and minister, was present in the chancel on Sundays for the purpose of performing Divine service therein, and during the celebration of Divine service on Sundays in the parish church, against the consent and will of him as such vicar, incumbent and minister, and of the defendant Davis as such churchwarden, wrongfully and improperly opened and kept open the door of the chancel to the great annoyance, nuisance and disturbance of the defendants and others, members of the congregation then assembled in the parish church for the celebration of Divine service, and against such consent and will refused to allow the door to be closed, and prevented the same from being closed: wherefore the defendant Dighton, as and then being such vicar, *incumbent [*95 and minister, and the defendant Davis by his command, in order that the defendant Dighton, as and being such vicar, incumbent and minister as aforesaid, might have at all reasonable times access and egress to and from the chancel through the door, and because he could not otherwise have the same, and in order to prevent a repetition of the said offence and misconduct of the plaintiff during the celebration of

Divine service on Sundays in the church and chancel, did, as it was reasonable and necessary to do for the purposes aforesaid, take off the lock; and, because it was necessary that the door should be fastened at such times as it was reasonable and proper to fasten the same, did also affix upon the same the other lock mentioned; and the defendants then caused two keys to be made to the last-mentioned lock, one to be and the same was retained by the defendant Dighton as such vicar and incumbent, and the other the defendants were always ready and willing to deliver to the plaintiff if she would accept and receive the same, as the plaintiff had notice; and the defendants in and about the premises did to a small and reasonable extent commit the supposed trespasses to which this plea is pleaded, doing no unnecessary damage in that behalf.

Demurrer, and joinder.

The demurrer was argued in the Court below in Easter Term, 1863, April 28th; before COCKBURN, C. J., CROMPTON, BLACKBURN and MELLOR, JJ.

It was agreed by both sides that the plaintiff was lay rector of the parish of Dixon.

Lush (*Bridge* with him), in support of the demurrer.—The plea sets *96] up two rights on the part of the vicar *as against the rector. First, A right to keep open the door in the chancel of this church: Secondly, A right to keep it locked. The plea is in point of form vicious for duplicity; and the second of the rights claimed, namely, to lock the door against the rector, is absurd. [The defendants' counsel abandoned that.] The plea is founded on the notion, untenable in law, that the vicar is entitled to a key of every door of the parish church. The freehold of the edifice, or at least of the chancel, is in the rector; *Clifford v. Wicks*, 1 B. & A. 498; *Jones v. Ellis*, 2 Y. & J. 265, 275; for whom the vicar was originally a mere substitute: and, although the vicar has a right to enter the church for all ecclesiastical purposes, in no view can he be entitled to the key of a door in the chancel; unless it is a door through which the people enter the chancel for Divine service, and if such were the fact the plea ought to have alleged it. [COCKBURN, C. J.—Have not the churchwardens the management of the edifice?] In a qualified sense, namely, for repairing it, but the rector is bound of common right to repair the *chancel*. Except the patron and rector, none of the parishioners have any common law right to seats there. But even if the plaintiff's conduct here were unjustifiable, it is mere matter of ecclesiastical cognisance, and did not warrant the defendant in breaking the lock. A man who has a right of way over a close has no right to take off a lock of a gate across the line of way because he may be obstructed by it at some future time: *Dimes v. Petley*, 15 Q. B. 276 (E. C. L. R. vol. 69).

*97] *Phipson* (*Beresford* with him), contra.—Although it *may be conceded that the vicar has not all the powers of the rector, and that originally he was only a substitute for him, still the possession of the entire church is in the vicar by virtue of his induction: 1 Blackst. Comm. 388, 391, 2 Burn Eccl. Law, 55 b, 9th ed., *Beckwith v. Harding*, 1 B. & A. 508; *Bulwer v. Bulwer*, 2 B. & A. 470. In Com. Dig. *Eccles. Persons* (C. 14), "By the common law the vicar had not the freehold of the church or churchyard, nor could have a *juris utrum* for his glebe, nor be named tenant to the *præcipe* for his glebe, without his parson. But now, by

the stat. 14 Ed. 3, 17, a vicar, &c. shall have a *juris utrum* for lands, &c., of the vicarage, and recover in other writs, as a parson may. * *

* So, a vicar shall have the trees in the churchyard; for he stands liable to the repairs of the church: Semb. 2 Roll. 337, l. 15."(a) [MELLOR, J.—If the minister and churchwardens had not a right to enter the church at *all* times, any person might steal anything out of the church with impunity.] And if the possession of the vicar is only for the purpose of Divine service, as contended for by the other side, the lay rector might sue the vicar for walking across the churchyard on any other occasion. The law is thus stated in 1 Burn Eccl. Law 351, 9th ed.:—"Generally, the parson is bound to repair the chancel. Not because the freehold is in him, for so is the freehold of the church; but by the custom of England, which hath allotted the repairs of the chancel to the parson, and the repairs of the church to the parishioners; yet so, if the custom hath been for the parish, or the estate of a particular person to repair the chancel, that custom *shall be good; [*98 which is plainly intimated by Lindwood as the law of the church, and is also confirmed by the common law in the books of reports. But as to the obligation resting upon the parson, or upon the vicar, concerning that, the books of common law say nothing; and so it is wholly left upon that foot on which the law of the church hath placed it. As to the vicars, it is ordained by a constitution of Archbishop Winchelsea, that the chancel shall be repaired by the rectors and vicars, or others to whom such repair belongeth. Whereupon Lindwood observeth, that where there is both rector and vicar in the same church, they shall contribute in proportion to their benefice," p. 363-4. "As to the right of a seat in the chancel, it was originally inherent in every vicar. For before the Reformation, the hours of the breviary were to be sung or said in the chancel (not in the body of the church) by the express words of a constitution of Archbishop Winchelsea; and this was to be done, not only on Sundays and festivals, but on other days, by another constitution of the said archbishop; and these hours were to be sung or rehearsed, not by the vicar alone, but with the consort and assistance of all the clergymen belonging to the church, which were the ecclesiastical family of the vicar. So that it is evident, that all vicars had a right of sitting there before the Reformation, and by consequence must retain this right still, unless it appear that they have quitted it; and if they have not for forty years past used the right, this breeds a prescription against them in the ecclesiastical Courts. In many chancels are to be seen the ancient seats or stalls used by the vicar and his brethren in performing these religious offices, like those which remain in the old choirs of cathedral and collegiate *churches; and hence it is, that [*99 *cancellus* and *chorus* (the chancel and the choir) are words of the same signification. This being the place where the body of the clergy of every church did sing, or at least rehearsed their breviary; and if any common parishioner may prescribe to a pew in the chancel, much more may the vicar. As these seats were placed at the lower end of the choir or chancel, for the daily use of the vicar, so at the upper end stood the high altar of every church, where, as the vicar, or his representative, was obliged to celebrate mass every Sunday and holiday of obligation,

(a) i. e. Rolle's Abridgment, who there cites as his authority Mich. 13 Ja., B. R., Bellamie's Case, which will be found reported 1 Roll. 255.

so he might do it every day, if there was occasion, or if he pleased; so that it is clear, the use of the chancel was entirely in the vicar." "It is therefore a very groundless notion with impropiators, that they have the same right in the great chancel that a nobleman hath in a lesser. These lesser chancels are supposed by lawyers to have been erected for the sole use of these noble persons; whereas it is clear the great chancels were originally for the use of clergy and people; but especially for the celebration of the Eucharist, and other public offices of religion, there be performed by the curate and his assistants. That the parsons repair these great chancels, doth not at all prove their sole right to them; for they were bound originally to repair the church as well as the chancel; and of common right the repairs of the church are still in the parson; it is custom only eases them of this burden." [COCKBURN, C. J., referred to Gibs. Cod. Jur. Eccl. Ang. 223.] In Cripps' Law of the Church, p. 443, 4th ed., "Lord Coke says, in the chancel the freehold is in the parson, and is parcel of his glebe; yet it appears now to be clearly established that this is not so; and that whatever property *100] or right the *parson or rector may have in the chancel, he has not that full and exclusive property which he may be said to have in his glebe; for the jurisdiction of the Ordinary extends to the chancel as well as to other parts of the church; and it would be most inconvenient if it were not so; for when lay impropriations began, the rights and property in the chancel passed to the lay rectors: and it is this which in fact has given rise to frequent litigation on the subject; and it now seems to be decided that the rector has the freehold in the chancel in the same way as, and no further than, he has in the church and the churchyard. He is not therefore entitled as of right to make a vault or affix tablets in the chancel without leave of the Ordinary; nor is he entitled to a faculty for such purposes without laying before the Ordinary the particulars, in order to satisfy him that the tablets or vault will not interrupt the parishioners in the use and enjoyment of the chancel. The burden of repairing the chancel, in the absence of a custom to the contrary, rests of common right on the rector; but so also the parishioners are bound of common right to repair the body of the church; but as this confers no right on the parishioners to oust the jurisdiction of the Ordinary, so neither does it confer a similar right in the rector. And as to the use of the chancel, it clearly belongs to the parishioners for the decent and convenient celebration of the Holy Communion, and the solemnization of marriage. This, however, is during the administration of Divine service only, for the possession of the whole church is in the minister and churchwardens; and no person has a right to enter it, when not open for Divine service, except by their permission." [COCKBURN, C. J.—I have had occasion lately to consult *101] that book, and was much struck with the ability and research displayed in it. What authority does he cite for what you have last read?] Jarratt v. Steele, 3 Phillim. 167. [BLACKBURN, J.—No question arose there about the rector.]

Lush, in reply.—No authority has been cited to show that, as between him and the rector, the legal possession of the church is in the vicar. He may be possessed of it as against wrongdoers, and has a right to the use of it for the purposes of religious worship at all times, but the legal possession of the church is in the rector, who can prohibit.

his entering it by any door except of course the main door by which all parishioners have a right to enter. Even a perpetual curate has possession of the church as against wrongdoers, *Jarratt v. Steele*, 3 Phillim. 167; *Jones v. Ellis*, 2 Y. & J. 265; but it could not be contended that he has against the rector. [MELLOR, J.—In *Lee v. Matthews*, 3 Hagg. Eccl. R. 169, 173, Sir John Nicholl says, “The minister has, in the first instance, the right to the possession of the key, and the churchwardens have only the custody of the church under him.”] It does not appear there who the minister was; and he would be entitled to the key as against the vestry. The doctrine laid down in the passage which has been cited from 1 Burn Eccl. Law, pp. 363–4, relative to the rector’s power over the chancel, must be understood as between him and the Ordinary. [MELLOR, J.—In *Clifford v. Wicks*, 1 B. & A. 498, it is said in argument, p. 505, and also by Bayley, J., p. 506, that the Ordinary may grant permission to other persons to have pews in the chancel.] The only authority cited for that is *Gibson’s Cod. Jur. Eccl. Angl. 224; but Watson’s Clergy-man Law, ch. 39, which is a later authority, is at variance [*102 with it. It is clear that the effect of induction is to put the rector in seisin of the church; 1 Bl. Com. 388, 391; and there cannot be two co-existing freeholds in its fabric. No tablet can be put up in the chancel without consent of the rector, and the passage which has been cited from Com. Dig. Eccl. Persons (C. 14), relative to the right of the vicar to the trees in the churchyard, is only a *semble*.

Cur. adv. vult.

The judgment of the Court was delivered, in Trinity Term, 1863, May 25th, by

COCKBURN, C. J.—This was an action of trespass brought by the plaintiff, as lay rector of the parish of Dixon, in the county of Monmouth, against the defendants, the vicar and one of the churchwardens of the parish, for taking off the lock of the door leading into the chancel of the parish church, the plaintiff claiming as lay rector, and without alleging any special title, the possession and control of the chancel, subject to its use and application to the purposes of Divine worship; and the question submitted to us was, whether the lay rector or the vicar and churchwardens were entitled to the possession and control of the chancel, and consequently to the control of this door, as well as to the means of access which it afforded.

On the argument, the case for the plaintiff was put on two grounds. First. It was contended that, the freehold of a church being in the rector, the right of possession followed; and, consequently, that as against a rector even the incumbent minister would have at [*103 *common law no right to the possession of the church, even for the special purposes to which it is appropriated; such use being capable of being enforced in the spiritual Court alone: that, consequently, a rector has alone the right to the control of the doors of the edifice, and is bound to open them only so far as necessity might require or his own discretion might suggest, whence it would follow that the minister and churchwardens would be guilty of trespass, if, against the will of the rector, they forced open a door of the church, even for the purposes of ministration. Secondly. If this position should be found untenable as regards the whole body of the edifice, it was contended that, at all

events, the chancel was peculiarly appropriated to the rector, and that, subject to its use in the administration of the Holy Communion and the celebration of marriage, the possession of this part of the church must be taken to belong exclusively to him.

We are of opinion that neither of these positions is tenable, and that a lay rector has not, as against the vicar, any right to the possession and control either of the body of the church or of the chancel.

It is no doubt true that in contemplation of law the freehold of the church, and therefore that of the chancel, which forms part of the church, as well as the freehold of the churchyard, is in the rector, whether spiritual or lay; but this naked and abstract right carries with it, in our judgment, no right of possession, the latter being in the incumbent, who is responsible to the Ordinary for the celebration of public worship.

Where there is a spiritual rector he has, when inducted, the corporal possession of the church for the use of the parishioners, subject to the *104] control of the *Ordinary. When there is no spiritual rector, the vicar, or the perpetual curate has upon induction the like possession for the like purposes. See *Jones v. Ellis*, 2 Y. & J. 265. In the case of *Rex v. Hickman*, 2 East Pleas of the Crown 593, 1 Leach C. C. 318, the prisoner was held to have been properly convicted of stealing lead from a church, on a count which laid the property in the vicar. If the lay impropriator, by the mere fact of being so, has not only the freehold of the church, but the possession as incident to the freehold, that conviction would have been improper.

Independently of these authorities, when it is borne in mind that churches in their origin were dedicated by those who erected them and gave the sites on which they were built for the purposes of religion and the worship of God, it would obviously be inconsistent with the object for which they were established to hold that in the case of a lay impropriation the right of possession followed the freehold, which in contemplation of law is in the rector. It seems to us, therefore, that the position that a lay rector has, as against the vicar, a right to the possession of the church is one that cannot be sustained.

We are equally of opinion that in this respect there is no distinction between the body of the church and the chancel. In the case of *Clifford v. Wicks*, 1 B. & A. 498, Holroyd, J., says, p. 507, "The rector has the freehold in the chancel in the same manner as he has in the church and the churchyard." And we are of opinion that a rector has no more right or interest in the chancel than he has in any other part of the church. The notion that the chancel is part *105] of the rector's glebe, though *entertained by Lord Coke, is now exploded. It is true the rector is bound to repair the chancel; but this arises, not from his having any peculiar property or interest therein, but by the custom of the realm: Com. Dig. *Eglise* (G. 2). Probably this custom had its origin in the fact that the nave or body of the church was appropriated to the parishioners, while the chancel was appropriated to the performance of the holy offices and the seats of the ministers. Originally all repairs, both of nave and chancel, were defrayed out of the tithes: but in process of time the clergy succeeded in inducing the laity to take upon them the burden of repairing that portion of the church which was allotted to them. To induce them

to undertake to repair the chancel, in which the clergy and their assistants had their places, would of course have been a matter of much greater difficulty. Moreover, the liability of the rector to repair the chancel is not universal. It is said that where there are both rector and vicar in the same church they shall, there being no custom to the contrary, contribute to the repair of the chancel in proportion to their benefice. Rogers Eccl. Law 166, citing Lindwood 253;(a) or, if there be a perpetual vicar, the repair may be cast upon him, Com. Dig. *Eglise* (G 2). Nor does the general right of a rector to have a pew in the chancel carry with it any further consequence as relates to any peculiar right or interest in that part of the church. Originally vicars had the like right. "As to the right of a seat in the chancel," says Burn Eccl. Law, vol. 1, p. 853, 9th ed., "it was originally in every vicar." Further on, p. 364, "It is therefore a very groundless notion with impropiators, that they have the same *right in the great chancel that a nobleman hath in a lesser. These lesser chancels [*106 are supposed by lawyers to have been erected for the sole use of these noble persons; whereas it is clear the great chancels were originally for the use of clergy and people; but especially for the celebration of the Eucharist, and other public offices of religion, there to be performed by the curate and his assistants. That the parsons repair these great chancels, doth not at all prove their sole right to them; for they were bound originally to repair the church as well as the chancel; and of common right the repairs of the church are still in the parson; it is custom only eases them of this burden. The Ordinary hath no power to order morning or evening prayer to be said in noblemen's chancels, but he can order them to be said in the great chancel."

There appears to be no doubt that the jurisdiction of the Ordinary for the benefit of the parishioners extends to the chancel as well as to the church. Gibson Cod. Jur. Eccl. Angl. 224, says, that "the seats in the chancel are under the disposition of the Ordinary, in like manner as those in the body of the church," "which," he adds, "need only be mentioned, because there can be no real ground for exempting it from the power of the Ordinary; since the freehold of the church is as much in the parson, as the freehold of the chancel; but this hinders not the authority of the Ordinary, in the church, and therefore not in the chancel." In *Clifford v. Wicks*, 1 B. & A. 498, Bayley, J., says, p. 506, "The general rule is, that the rector is entitled to the principal pew in the chancel; but that the Ordinary may *grant permission to other persons to have pews there." Mr. Rogers, in his work on [*107 Ecclesiastical Law, p. 187, says, "It seems, however, to be now generally considered that the jurisdiction of the Ordinary extends to the chancel as well as to the other parts of the church. The circumstance that the freehold is in the rector would equally be an objection to the power of the Ordinary over the other parts, for the freehold of the whole is in the rector. Neither does the circumstance of his being bound to repair affect the question, for he is bound to repair the chancel of common right, as the parishioners are bound of common right to repair the nave of the church; but that, as we have seen above, gives them no right to dispose of seats in the nave, nor in any way oust the jurisdiction of the Ordinary." In *Rich v. Bushnell*, 4 Hagg. Eccl. R. 164, it was

held that the lay rector is not entitled as of right to make a vault, or affix tablets in the chancel without leave of the Ordinary; nor is he entitled to a faculty for such purposes without laying before the Ordinary the particulars, so as to satisfy him that the vaults or tablets will not interrupt the parishioners in the use and enjoyment of the chancel. In giving judgment, Sir John Nicholl observed, p. 170, "Though the freehold of the chancel may be in the rector, lay or spiritual, as by a sort of legal fiction the freehold of the church is in the incumbent, and though the burthen of repairing the chancel may rest on such rector, yet the use of it belongs to the parishioners for the decent and convenient celebration of the Holy Communion, and the solemnization of marriage; *108] and, by the Rubric, that portion of the communion service, *which forms a part of the regular morning service, is directed to be read from the communion table which is appointed to stand in the body of the church, or in the chancel."

In the case of *Jarratt v. Steele*, 3 Phillim. 167, which was a suit instituted in the Arches Court of Canterbury by a vicar against the lessee of the great tithes for having forced open the door of the chancel, on which the vicar had placed a lock, and pulled down part of two pews, with a view to the erection of new ones, Sir John Nicholl in giving judgment said, p. 169, "All persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws—as they are administered in these" (i. e. the Ecclesiastical) "Courts; that the possession of the church is in the minister and the churchwardens;—and that no person has a right to enter it when it is not open for Divine Service, except with their permission." It evidently did not occur to the mind of the learned Judge to doubt that the vicar was entitled to the possession of the chancel, or that the suit was rightly instituted by him.

On these grounds we are of opinion that our judgment should be for the defendants. Judgment for the defendants.

The plaintiff having brought error on this judgment, the case was now heard before ERLE, C. J., WILLIAMS and WILLES, JJ., and CHANNELL, B.

*109] **Bridge* for the plaintiff.—The vicar of a parish where there is also a rector has no possession of the parish church, far less of the chancel, farther than is indispensable for the performance of Divine service. The rights which a vicar has over the parish church are either by prescription or by statute, as, for instance, 4 H. 4, c. 12, 27 H. 8, c. 28, 31 H. 8, c. 13, the two latter of which introduced *lay* rectories. [He cited Johnson's *Clergyman's Vade-Mecum* 265, 269–70.] But subject to these rights the freehold of the church is in the rector: *Burton Real Property* 376, 1209 n., 8th ed.; *Stocks v. Booth*, per Buller, J., 1 T. R. 428, 430. Besides, the door in question here was in the chancel, the repair of which lies on the rector. In *Walwyn v. Awberry*, 1 Mod. 258, North, C. J., says, p. 261, "It has been said, that the parishioners have a right in the chancel; but I question that: it is called cancellum, a cancellis; because the parishioners are barred from thence." [WILLIAMS, J.—In *Watson's Clergyman's Law*, c. 39, 8d ed., are these passages. At p. 391: "I conceive, that (although that the freehold and soil of the chancel may be in the appropriator, or impropriator, especially where they repair the same, either by composition

or prescription, which is in most places in England, except in London) the freehold and soil of the body of the church is in the vicar, as a part of his glebe, for thereof he takes possession at his induction, by which he is seised of all the profits of the vicarage; which way of taking possession would be very strange, if the church itself was not a part of that to which he hath a right by *institution, and of which he is seised by his induction, also this appears from the vicar's being [*110 obliged of common right to repair the church: Roll. Abr. 2, p. 337. Also the trees in a churchyard are said to belong to the vicar, so that if they be cut down by the parson, or any other, and a suit be in the Court Christian not only to punish the fact, but also for damages, a prohibition lyeth." And at p. 382, "Though the freehold of the body of the church be in the incumbent thereof, and the seats therein be fixed to the freehold, yet because that the church is dedicated to the service of God, and is for the use of the inhabitants, and the seats are erected for their more convenient attending upon Divine service, the use of them is common to all the people that pay to the repair thereof: And for this reason, if any seat, though affixed to the church, be taken away by a stranger, the churchwardens (and not the parson) may have their action against the wrongdoer," for which he cites 8 H. 7, 12.] In Degge's Parson's Counsellor, 202, 7th ed., it is said, "The freehold of the whole church, and churchyard are in the parson or rector, and therefore the parson may have an action of trespass against anybody that shall do any trespassable act in the church, or churchyard; as in breaking seats annexed to the church, in breaking the windows, cutting the trees, or taking away the leads, or any of the materials of the church, or for breaking windows, the party may be indicted and fined, and bound to his good behaviour." Clifford v. Wicks, 1 B. & A. 498, and Jones v. Ellis, 2 Y. & J. 265, which were relied on in the Court below to show possession in the vicar, only establish that he has a sufficient *pos- [*111 session to support an action against a wrongdoer. But so has the erector of a tombstone, who may maintain an action against any person who interferes with it, Spooner v. Brewster, 3 Bing. 136 (E. C. L. R. vol. 11); and this even against the parson: Co. Litt. 18 b; Wyche's Case, 9 Edw. 4, 14 a, pl. 8, Garven and Pym's Case, Godb. 199-200.

Even if the vicar's right of access to the church at all reasonable times be conceded, it does not follow that he has the right claimed by this plea of entering it by any particular door. Besides, the plea justifies a trespass on the ground that it is to prevent a repetition of misconduct, a thing which ought not to be presumed. At all events, if the plaintiff was wrong in locking this door, the remedy against her lies in the Ecclesiastical Court.

Manisty (Beresford with him), contra.—The freehold of the church is in the rector, but the vicar is by his induction put bodily in possession of it for the use of the parishioners: Lee v. Matthews, 3 Hagg. Eccl. R. 169, 173; Rich v. Bushnell, 4 Id. 164; Jarratt v. Steele, 3 Phillim. 167, 169-170; Jones v. Ellis, 2 Y. & J. 265. In Degge's Parson's Counsellor, p. 213, 7th ed., "Though the freehold of the church be in the parson, yet he cannot pull down any of the seats anciently erected, or of late erected, but by license from the bishop, or by the consent of the churchwardens." No sound distinction exists in this respect be-

tween the chancel and the other parts of the church: Corven's Case, 12 *112] Co. 105; *Clifford v. Wicks, 1 B. & A. 498, 507, per Holroyd, J. The notion that the parishioners can be excluded from the former is unfounded; for most important duties, especially the administration of the Holy Communion, are performed in it; and before the Reformation, service was performed there every day, 1 Burn Eccl. Law 368, 9th ed.; and although the rector is bound to repair it, and not the rest of the church, 2 Inst. 489, this is not because it is his freehold, but because such is the custom of England: Gibs. Cod. Jur. Eccl. Angl. 233; Watson's Clergyman's Law 388; Com. Dig. *Eglise* (G 2); and the power of the Ordinary extends to all parts of the church, Gibson, Cod. Jur. Eccl. Angl. 224; Oliphant on Pews, p. 8, where the authorities are collected. [CHANNELL, B., referred to Morgan v. Curtis, 3 Man. & R. 389, there cited.]

Bridge, in reply.—*Jarratt v. Steele*, 3 Phillim. 167, 170, only establishes that the Ecclesiastical Court will protect the right of the vicar as against a wrongdoer who interferes with the fabric of the church. *Rich v. Bushnell*, 4 Hagg. Eccl. R. 166, merely shows that the lay rector's rights over the chancel may be limited as regards the Ordinary. It is not correct to say that by custom the rector repairs the chancel and the inhabitants the church, for in ancient times the repair of the whole church was in the person who received the tithes. [ERLE, C. J.—That was in the time when the tithes also maintained the poor.] When the parishioners obtained a right to seats in the body of the church, it naturally became their duty to repair it, but *113] the original right of the rector to repair the chancel remained as in the earliest times. *Rex v. Hickman*, 2 East, P. C. 651, (a) is an authority that, on an indictment for stealing lead from the body of a church, the property may be laid in the vicar; but it appears that many of the Judges thought that, under the stat. 4 G. 2, c. 82, on which that indictment was framed, the property need not be laid in any one.

ERLE, C. J.—This is an action of trespass by a lay rector against a vicar for taking the lock off a door leading into a parish church, which lock is claimed by the rector as his property; and the substance of the plea I take to be, that the defendant, as vicar, claims a right to go into all parts of the church and pass in and out through any of its doors at all times; and as the rector put a lock on one of them in order to prevent his passing through what I call one of the public doors of the church, the vicar had a right to put an end to that obstruction, so as to have free ingress and egress. This was ruled a valid defence in the Court below, and we are of opinion that their judgment ought to be affirmed.

In coming to this conclusion, I do not mean to go into the questions which have been raised as to the rights of the rector relative to the freehold which he may have in the chancel, or into the various rights of property which he may have in the church, or into the different customs in different parishes on these subjects. No such matters are involved in the consideration of the plea before us. For that plea is *114] founded on a claim of *right on the part of the minister who has duties to perform in the church: and I do not think that I can express his rights better than in the language of Sir John Nicholl in

(a) And more fully 593; s. c. 1 Leach C. C. 318.

the case of *Jarratt v. Steele*, 3 Phillim. 167, 169, 170, which was referred to by the Court below:—"All persons ought to understand that the sacred edifice of the church is under the protection of the Ecclesiastical laws as they are administered in these" (*i. e.* the Ecclesiastical) Courts;—that the possession of the church is in the minister and the churchwardens;—and that no person has a right to enter it when it is not open for Divine service, except with their permission, and under their authority." That is a perfectly sound exposition of the law in the temporal as well as in the Ecclesiastical Courts. The *domus mansionalis Omnipotentis Dei*, 3 Inst. 64, is not to be turned from the purpose which that name expresses, and the minister and churchwardens are entitled to possession of the church and to have free access to it at all times. It is not necessary to consider what would be the rights of the vicar if part of the fabric were wilfully damaged; my judgment proceeds entirely on the principle laid down by Sir John Nicholl to which I have referred.

And no doubt, taking into consideration the history of the church, if any one part of the fabric be more subject to the rights of the vicar than another it should be the chancel, seeing that it was peculiarly dedicated to the performance of the Divine offices.

WILLIAMS and WILLES, JJ., and CHANNELL, B., concurring,
Judgment affirmed.

[*CATOR v. Board of Works for the LEWISHAM DISTRICT. [Nov. 28.] [*115]

Metropolis Local Management Act, 18 & 19 Vict. c. 120.—District Board.—Pollution of water in land of another person.—Action.—Compensation.

1. A District Board of Works, constituted under The Metropolis Local Management Act, 18 & 19 Vict. c. 120, are not empowered by that Act to pollute water flowing through the land of another person, and are therefore liable to an action at the suit of the owner of the land through which it flows, who is consequently not bound to proceed for redress by seeking compensation under that statute. Per the Exchequer Chamber, consisting of Erle, C. J., Byles and Keating, JJ., and Channell and Bramwell, BB.; diss. Pollock, C. B., and Pigott, B.

2. It makes no difference in this respect that the works executed by the District Board were necessary for the abatement of a nuisance, even in the land of the party injured. *Id.*

3. Nor that the water thus polluted lay outside the district over which the authority of the District Board extended. *Id.*; reversing the decision of the Queen's Bench, consisting of Cockburn, C. J., and Blackburn, J.

4. *Quære*, whether the Metropolitan Board of Works are so empowered by the Act?

THIS action, commenced on the 3d June, 1862, was for permanently fouling and polluting a certain stream and a certain watercourse, in the county of Kent, called The Poole River and The County Bridge Stream respectively, flowing through certain land the reversion of which was in the plaintiff, to his injury as such reversioner.

The defendants pleaded not guilty: that the plaintiff was not possessed of the reversion: that he was not entitled to the flow of the stream and watercourse without being fouled or polluted: and a justification under The Metropolis Local Management Act, 18 & 19 Vict. c. 120.

The plaintiff joined issue on the first three pleas: and to the fourth new assigned for grievances committed in excess of the alleged rights and powers in that plea *mentioned and on other occasions, and [*116 for other purposes than those therein referred to.

The defendants pleaded not guilty to the new assignment, and issue was joined upon it.

At the Kent Summer Assizes in 1862, a verdict was by consent entered for the plaintiff, subject to a case to be settled by a barrister, by whom the following special case was settled accordingly.

The plaintiff is owner of the reversion of certain lands through which flows a stream called The Poole River, and of a watercourse which is known by the name of The County Bridge Stream. The defendants are the Board of Works for the Lewisham District, constituted, on the 1st of January, 1856, under The Metropolis Local Management Act, 18 & 19 Vict. c. 120.

The Poole River is a natural stream of considerable width and depth. The County Bridge Stream flows in a deep dike or ditch, and except in wet weather is narrow and shallow. The plaintiff's lands are not within the defendants' district, nor within the area to which The Metropolis Local Management Act applies.

The injury of which the plaintiff complains is the pollution of the County Bridge Stream and the Poole River, by the discharge through sewers constructed by the defendants of large quantities of filth into the watercourse called the County Bridge Stream, which joins the Poole River at a point about 400 yards from the outfall of the sewers. It is admitted that the flow of filth into the plaintiff's watercourse and stream is such an injury to the reversion as would entitle him to maintain this action if the remedy by action be not taken away by The Metropolis Local Management Act, 1855.

*117] *Prior to the year 1852, but few houses had been built in the district over which the jurisdiction of the defendants as a Board of Works now extends. The sewage from some of those houses escaped either by open drains cut for the purpose, or by percolation through the soil into open watercourses. These watercourses had a common outfall through a culvert, which has existed for more than twenty years, into The County Bridge Stream, and a small quantity of the sewage which escaped into the watercourses was carried into The County Bridge Stream and thence into The Poole River, but without fouling either to any appreciable extent.

In the year 1852, the erection of the Crystal Palace at Sydenham was commenced, and in that and the following years a great number of new houses were built within the defendants' district. A great portion of the sewage from The Crystal Palace and from the new houses was carried off in the same manner as the drainage of the houses previously built, viz., through the open watercourses and thence through the culvert before mentioned into The County Bridge Stream. The flow of sewage into The County Bridge Stream was in consequence increased, and the effect was to pollute the latter and also The Poole River to an appreciable, but not to a serious extent.

The open watercourses continued to be used for the drainage of a large number of buildings within the defendants' district down to the year 1859. About that time the condition of the watercourses had become a serious nuisance to the inhabitants of the district. Large quantities of filth accumulated in them, the effluvia from which were of the
*118] worst description, and in many places *the adjacent soil was overflowed and saturated with offensive matter.

In order to put an end to the further use of the open watercourses for purposes of drainage, and to provide efficient means for the drainage of the whole district, the defendants, in the years 1859 and 1860, caused a number of underground sewers to be constructed, the operation of which, as regards the plaintiff's stream and watercourse, is the subject of complaint in this action.

In many instances, the defendants' sewers run in the same direction and follow nearly the same course as the old watercourses. The outfall of both is the same, viz., through the before-mentioned culvert into The County Bridge Stream. The mouth of the culvert is within the area of the defendants' jurisdiction, but is very close to the boundary.

In addition to the sewers constructed by the defendants, the defendants further adopted into their plan of drainage, and took under their control, certain underground sewers which had been constructed for the drainage of houses built by The Anerly Building Society on an estate within the defendants' district called The Anerly Building Estate. They had been originally constructed in the year 1856 with an outfall into one of the open watercourses before mentioned. In the year 1859 the defendants provided a new outfall for them into a sewer which they had substituted for the watercourse.

The new system of sewers adopted by the defendants has prevented the accumulation and flow of filth in the open watercourses and has effectually provided for the drainage of the defendants' district, but the quantity of *filth carried into The County Bridge Stream and [*119 thence into The Poole River was, when this action was brought, and still is, vastly in excess of what had reached it before the new sewers were constructed. The effect of the increased discharge from the sewers into The County Bridge Stream and The Poole River is to render them foul, stinking and wholly unfit for cattle or ordinary domestic purposes.

The defendants contend that the plaintiff's remedy for the injury done to his stream and watercourse is not by action, but by proceedings to obtain compensation in the manner provided by the 18 & 19 Vict. c. 120. In support of their contention, the defendants rely on sections 68, 69, 86, 225 and 226 of the Act.

The question for the opinion of the Court is, whether under the circumstances of this case the plaintiff can maintain this action against the defendants.

The question turned on the two following sections of The Metropolis Local Management Act, 18 & 19 Vict. c. 120.

Sect. 69. "The vestry of every parish mentioned in Schedule (A.) to this Act, and the Board of Works for every district mentioned in Schedule (B.) to this Act, shall (subject to the powers by this Act vested in the Metropolitan Board of Works) from time to time repair and maintain the sewers under this Act vested in them, or such of them as shall not be discontinued, closed up, or destroyed under the powers herein contained, and shall cause to be made, repaired, and maintained such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their parish or district, and shall cause all *banks, wharves, docks, or defences abutting on [*120 or adjoining any river, stream, canal, pond, or watercourse in such parish or district to be raised, strengthened, or altered or repaired,

where it may be necessary so to do, for effectually draining, or protecting from floods or inundation such parish or District; and it shall be lawful for any such vestry or District Board to carry any such sewers or works through, across, or under any turnpike road, or any street or place laid out as or intended for a street, or through or under any cellar or vault which may be under the pavement or carriageway of any street, and into, through, or under any lands whatsoever, making compensation for any damage done thereby as hereinafter provided; and it shall be lawful for any such vestry or District Board from time to time to enlarge, contract, raise, lower, arch over, or otherwise improve or alter all or any of the sewers, watercourses, and works which shall be from time to time vested in them or subject to their order and control, and to discontinue, close up, or destroy such of them as they may deem to have become unnecessary: Provided always, that no new sewer shall be made without the previous approval of the Metropolitan Board of Works: Provided also, that the discontinuance, closing up, destruction, or alteration of any sewer as aforesaid shall be done so as not to create a nuisance; and if by reason thereof any person shall be deprived of the lawful use of any covered sewer, it shall be the duty of the vestry or District Board to provide some other sewer or a drain as effectual for his use as the sewer of which he is so deprived: Provided also, that where the vestry or District Board alter any sewer, or provide a new *121] sewer *in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private drains, and provide new drains in lieu thereof, as the circumstances of the sewerage may appear to them to require, but so that in every case the altered or substituted drain shall be as effectual for the use of the person entitled thereto as the drain previously used."

Sect. 86. "Every vestry and District Board shall drain, cleanse, cover, or fill up, or cause to be drained, cleansed, covered, or filled up, all ponds, pools, open ditches, sewers, drains, and places containing or used for the collection of any drainage, filth, water, matter, or thing of an offensive nature, or likely to be prejudicial to health, which may be situate in their parish or district; and they shall cause written notice to be given to the person causing any such nuisance, or to the owner or occupier of any premises whereon the same exists, requiring him, within a time to be specified in such notice, to drain, cleanse, cover, or fill up such pond, pool, ditch, sewer, drain, or place, or to construct a proper sewer or drain for the discharge of such filth, water, matter, or thing, or to do such other works as the case may require; and if the person to whom such notice is given fail to comply therewith, the vestry or Board shall execute such works as may be necessary for the abatement of such nuisance, and may recover the expenses thereby incurred from the owner of the premises in manner hereinafter mentioned: Provided always, that it shall be lawful for such vestry or Board, where they *122] think it reasonable, to defray all or any portion of *such expenses, as expenses of sewerage are to be defrayed under this Act: Provided also, that where any work by any vestry or District Board done or required to be done in pursuance of the provisions of this Act interferes with or prejudicially affects any ancient mill, or any

right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby, in manner hereinafter provided, or it shall be lawful for the vestry or Board, if they think fit, to contract for the purchase of such mill, or any such right connected therewith, or other right to the use of water; and the provisions of this Act with respect to the purchases by the vestry or Board hereinafter authorized shall be applicable to every such purchase as aforesaid."

Stat. 25 & 26 Vict. c. 102, to amend the preceding Act, by its 58th section empowers the vestries and District Boards to execute works beyond the limits of the Metropolis; but this statute did not come into operation until after the present suit was commenced.

The case was argued in the Court below, in Trinity Term, 1863, June 5th, before COCKBURN, C. J., WIGHTMAN, J. (who died before the judgment), and BLACKBURN, J.

Bovill (*Lush* and *Murphy* with him), for the plaintiff.—The great object of The Metropolis Local Management Act, 18 & 19 Vict. c. 120, was to prevent nuisances, public or private; whereas, the construction sought to be put on it by the defendants would tend to legalize them when created by themselves. The statute having provided for the constitution of vestries, sect. 2, and the formation of parishes into districts, and the *constitution of District Boards, sects. 31, 32, [*123 38, 42, 68, vests all sewers in them, except the main sewers. Sect. 69 then directs the vestries and District Boards (subject to the powers vested in the Metropolitan Board of Works) to repair and maintain the sewers so vested in them, &c., but in such a manner "as not to create a nuisance." By sect. 72 they are to cause sewers to be "constructed, covered, and kept so as not to be a nuisance or injurious to health." By sect. 86 they are to "drain, cleanse, cover, or fill up, &c., all ponds, pools, open ditches, sewers, drains, and places containing or used for the collection of any drainage, filth, water, matter, or thing of an offensive nature, or likely to be prejudicial to health, which may be situate in their parish or district." By sect. 135 the main sewers of the Metropolis are vested in the Metropolitan Board of Works, with power to make sewers, and the Board shall cause the sewers vested in them to be "constructed, covered, and kept so as not to be a nuisance or injurious to health;" and by sect. 138 they may make orders for controlling the vestries and District Boards in the construction of sewers, &c.

The compensation clauses of sects. 69 and 86 only apply to works legalized by the Act. If the vestry or District Board are not empowered to create nuisances within their own district, still less are they empowered to affect by nuisance what lies beyond it. Until the subsequent Act, 25 & 26 Vict. c. 102, s. 58, their powers were limited to that district.

Mellish (*Raymond* with him), contra.—The plaintiff had no right to sue the defendants, his sole remedy for what was done being by application for compensation *under the statute. If the defendants had [*124 cut off his supply of water he could have had no other remedy, and it is impossible to distinguish the cases. The circumstance of the plaintiff's land lying outside the defendants' district makes no difference. Besides, this is at most a private nuisance, for it is not stated that what

was done was injurious to health. [He cited *Stainton v. Woolrych*, 28 Beav. 225, Reg. v. The Metropolitan Board of Works, 3 B. & S. 710 (E. C. L. R. vol. 113), and *Chasemore v. Richards*, 7 H. L. C. 849, and BLACKBURN, J., referred to Com. Dig. *Action upon the Case for a Nuisance.*]

Bovill, in reply.—The Legislature could not have intended that a vestry or District Board should have a right to discharge their sewage bodily over a neighbouring district. Here the polluted water must be injurious to health, for it was polluted so as to be unfit for cattle or domestic purposes. [He cited Reg. v. The Guardians of the Epsom Union, 11 W. R. 593.] *Cur. adv. vult.*

The judgment of the Court was delivered at the Sittings in banc after Hilary Term, 1864, on the 22d February, by

BLACKBURN, J.—In this case, which was heard before my Lord Chief Justice, the late Mr. Justice Wightman, and myself, and in which no decision had been come to prior to the death of our late lamented colleague, I have now to deliver the judgment of the remaining *125] members of the Court. We have come to the conclusion, though *not without some hesitation, that our judgment should be for the defendants.

The point may be very shortly stated. The drainage of the district of Lewisham has for many years been carried into a stream called The County Bridge Stream, which stream flows into a river called The Poole River; both of which in their progress onward flow through land belonging to the plaintiff, beyond the limits of the Lewisham district. The population and the number of houses in a part of the Lewisham district having of late years greatly increased, and the want of additional drainage having occasioned an accumulation of offensive matter, causing serious inconvenience, the defendants, the Board of Health for the district, executed the drainage works stated in the case, availing themselves, as heretofore, of The County Bridge Stream to carry off the sewage matter. The effect of the additional and more effective drainage has been to cause a quantity of offensive matter to pass down into The County Bridge Stream and Poole River, sufficient to pollute the water, which before was affected by the drainage only in an inappreciable degree, to such an extent as to cause substantial injury to the plaintiff. It is not disputed that for such injury the plaintiff is entitled to compensation; but the question is, whether his remedy is by action or by proceeding to obtain compensation under the 86th section of the 18 & 19 Vict. c. 120.

The drainage works executed by the defendants were beyond all question such as they were authorized, and indeed required, to make; and it cannot, we think, be disputed that, had the damage to the plaintiff occurred within the district, the only redress to which he would have *126] been entitled would have been compensation under *the 86th section of 18 & 19 Vict. c. 120. For it is plain that that section contemplates and provides for the possibility of damage being done to water-rights by the execution of sewerage works, it would comprehend a case in which a stream was polluted by offensive matter being discharged into it. But it is contended for the plaintiff that the authority and powers of the District Board to carry out the drainage of the district is confined to the limits of the district, and that they are not authorized to do anything which shall cause an injury to those who are

beyond the local boundary of their jurisdiction. And the 58th section of the subsequent Act 25 & 26 Vict. c. 102, is referred to as showing that such a Board, in the absence of express statutory enactment, would have no authority beyond the limits of the district for which they are appointed.

It is, however, to be observed that the 58th section of the 25 & 26 Vict. c. 102 has reference to *works to be executed* beyond the limits of the district, not to an injury arising without the district for works executed within it. Here all that has been actually done by the District Board has been done within their district. The injury of which the plaintiff has reason to complain is only a consequence of what has been done within the district, and, so far as the district itself is concerned, rightfully done. Now the words of the 86th section of the 18 & 19 Vict. c. 120 are sufficiently large to embrace an injury done by the pollution of a stream, whether within the local limits of the district or without. And to hold that the present case does not fall within the provision would be virtually to establish that no District Board or vestry could ever avail themselves for the purpose of drainage of a stream flowing beyond the local limits, if any damage should [*127] *occur to proprietors or occupiers farther down the stream. For, if the work causing such injury beyond the boundary ceases, because of such injury, to be within the powers of the local authority, and therefore is actionable, the injury being a continuing one fresh actions might from time to time be brought, and the work causing the damage would have to be undone. We cannot think that the Legislature intended to place this restraint on the powers conferred by the Act, and we think therefore that it will be safer and better so to construe the Act as to make the powers of the local authority and the provisions for compensation embrace such a case as the present.

It follows that the proceeding by action was not open to the plaintiff, and consequently that our judgment must be for the defendants.

Judgment for the defendants.

The plaintiff having brought error on this judgment, the case was argued on the 26th November.

Lush (Murphy with him), for the plaintiff.—Stat. 18 & 19 Vict. c. 120, does not enable a vestry or District Board to convert into a sewer the stream of another person, either within or without their district. The Metropolitan Board of Works, the jurisdiction given to whom by this statute is larger, seeing that the main sewers are vested in them, sect. 135, and that they may execute works beyond the limits of the Metropolis, have no such power; still less have vestries or District Boards, *in whom all other sewers are vested; sects. 68, 69, 86, [*128] and Schedule (D.); especially as they may drain into the main drains, or transfer, if they please, their powers to the Metropolitan Board: sect. 89. Whatever land or water these vestries or Boards want for the purpose of drainage they may purchase by agreement with the proprietors: sects. 150, 151. While the statute empowers these Boards and vestries to cover offensive drains and compel the owners to carry away the filth, it never intended that they should create nuisances, especially in cases like the present where no necessity is found for so doing. The defendants might as well claim a right to pour their sewage

over the plaintiff's field, to the ruin of the land for building and other purposes, and then compel him to carry the sewage away.

An analogous construction has been put on The Public Health Act, 1848, 11 & 12 Vict. c. 68: *The Manchester, &c. Railway Company v. The Workop Board of Works*, 23 Beav. 198; and the Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 84; *The Attorney-General v. The Council of the Borough of Birmingham*, 4 K. & J. 528.

Mellish (*Beresford* with him), contra.—The defendants did nothing more than the statute directed them to do by sect. 86, and consequently the only remedy the plaintiff has is by claiming compensation under it. They are ordered by that section to cover sewers, and direct other persons to do so. For the sewage there must still be an outfall somewhere, and no power is given to them to make contracts for its removal. It is true that, by one of the provisoes of sect. 69, they are prohibited *129] *from creating nuisances, but that only applies to nuisances caused by discontinuing sewers, and even then only to such as are of a public nature, which the sewers here are not found to be. If the works had cut the stream off altogether the remedy must have been by compensation. In compensation cases for injuries caused by railways or otherwise, no distinction is ever made between injuries done inside and outside a district. It is true the Metropolitan Board have power under this Act to carry their works beyond the Metropolitan district; but that only applies to the main drains, for which the whole Metropolis may be taxed. The cases which have been cited turned altogether on the provisions of the particular statutes under which they were decided. [He cited *Chasemore v. Richards*, 7 H. L. C. 349.]

Lush, in reply.—As to securing an outfall, if the vestry or District Board feels its powers insufficient, it may transfer them to the Metropolitan Board. If they direct an owner to cover an open sewer he would be entitled to compensation under this Act. Sect. 86 gives no power to purchase land *out* of the district, even supposing the Board could do so within it.

Cur. adv. vult.

There being a difference of opinion on the bench, the following judgments were now delivered.

PIGOTT, B.—This was an appeal from a judgment of the Queen's Bench upon a special case. The material facts stated by the case are, that the plaintiff was the owner of lands through which flowed the Poole *130] River *and a watercourse called The County Bridge Stream. The defendants are the Board of Works for the Lewisham District, constituted, on the 1st January, 1856, under The Metropolis Local Management Act, 18 & 19 Vict. c. 120. The plaintiff's lands are not within the defendant's district, nor within the area of The Metropolis Local Management Act.

The plaintiff complains of the pollution of The County Bridge Stream and The Poole River by the discharge, through sewers constructed by the defendants, of filth into the watercourse which joins The Poole River, 400 yards from the outfall of the sewers. Prior to 1852 there were few houses in the district of the defendants, and only a small quantity of the sewage found its way by open watercourses through a culvert, which had existed for more than twenty years, into The County Bridge Stream, and thence into the Poole River, but without fouling

them to any appreciable extent. In 1852 and subsequently the houses have greatly increased, and the sewage was carried off in the same way through the same open watercourses and culvert, and, being increased, the effect was to pollute the stream and Poole River to an appreciable but not serious extent. But in 1859 the open watercourses had become a serious nuisance to the inhabitants of the district. Large quantities of filth accumulated in them, the effluvia from which were of the worst description, and in many places the adjacent soil was overflowed and saturated with offensive matter. To put an end to the further use of the open watercourses, and to provide efficient drainage, the defendants, in 1859 and 1860, executed the works mentioned in the case, availing themselves of The County Bridge Stream to carry off the sewage. For the drainage *of the houses of The Anerly Building Society, [*131 which, since 1856, had been drained into one of the open water- courses, the defendants had also made an outfall into a sewer which was by them substituted for the watercourse. The effect of the new and additional drainage made by them has been to cause a quantity of offensive matter to pass into The County Bridge Stream and Poole River, to an extent to cause a substantial injury to the plaintiff's streams, but it has effectually provided for the drainage of the defendants' district. For the injury so caused the plaintiff brought this action, which resulted in the statement of this special case.

The defendants contend that the plaintiff is not entitled to maintain an action, but must proceed for compensation for his injury under the 86th section of stat. 18 & 19 Vict. c. 120. It cannot be disputed that he is entitled to be compensated in some way, and the question which we have to determine really depends on the proper construction which shall be put upon that statute.

In my judgment the effect of the 86th section of that statute is to throw upon the District Board the duty of draining and covering the open watercourses which are above described, and it gives them power to do so by such works, to be constructed in their own district, as are necessary for the abatement of the nuisances. The mode of doing the work is not pointed out; but the District Board are left to do what is necessary, by draining, cleansing, covering, or filling up. I think also that the works for draining the new houses of The Anerly Building Estate are not distinguishable from the rest. They are within the district, and were previously drained by means of one of the open watercourses, and which was a nuisance there. So far then as the works which have been *constructed within their district are concerned, it appears to me [*132 that they are authorized by the statute.

I now come to consider the question of the outfall into the streams of the plaintiff, the lawfulness of which depends upon the language of the proviso. That language appears to me large enough to include every mode in which water-rights may be prejudicially affected by sewerage works, and I cannot distinguish between streams within or without the local district. It is true there is no express permission given to use watercourses for outfalls, nor in my opinion was it to be expected that there would be, but on the other hand there is no prohibition on the subject, although the Legislature must be taken to have been well aware of the universal custom to drain towns by these outfalls. I therefore think that I am justified in construing the provisions of this legislation

(so far as the language used will admit of it), with reference to the existing and well known state of things at the time, and in my opinion the terms used in the proviso include cases of polluting water by throwing the sewage matter into it. The 150th section rather supports this view, by empowering District Boards to contract for the removal of weirs or other obstructions to the flow of water "whereby sewerage or drainage is interrupted or impeded." Mr. *Lush* argued that the proviso would be satisfied by our holding that the interference meant to include obstruction, but not pollution, of water. I cannot, however, see any reason for such a distinction, or that we are justified in putting an arbitrary limit to the plain language employed. Indeed it seems to me that, bearing in mind that sewerage is the subject-matter of the legislation, when the statute contemplates water-rights being prejudicially affected thereby, *138] it would be more likely to point to pollution as the prejudicial cause than to obstruction or other interference. I think that to adopt Mr. *Lush's* argument would be a virtual repeal of this section, for, without even increasing the area of the drainage, the District Board would, by merely converting an open course into a barrel drain, so confine the sewage matter and prevent percolation that the nuisance at the outfall would be increased, and the liability to an action thus incurred. In fact it is to this, as one cause in connection with the increase of new houses in the district, that the plaintiff's injury is attributable, for the District Board have not changed the course of the sewers or the point of outfall. The case does not state that the defendants could have sent the overflow in any other direction.

By the view I take, I believe that I am giving effect to the language and intention of the Legislature, who have taken care that no private rights shall be affected without ample compensation. The plaintiff may be deprived of the private enjoyment of his property to some extent, but he is only in the condition, now daily acted upon, of being called upon to yield a private right for the public benefit, and for as full a compensation as a jury may please to give him. The judgment of the Queen's Bench ought therefore in my opinion to be affirmed; but I speak with diffidence on the subject, finding so many of my learned brethren take a contrary view.

BYLES, J.—I am of opinion that the plaintiff is entitled to the judgment of the Court. The question is, whether the defendants can pour any amount of sewage from their own land, including the sewage of any district above them, into a private stream situated beyond the limit *134] of their district, and I may add at any distance below. The consequences of such an interference with the water might be not only the pollution of the stream, but the total annihilation of the value of the adjoining land for building purposes, and might subject the owner of the soil to an action, or to a prosecution for a nuisance. To test the result of the interference of the defendants by a strong case, the power now claimed by them would justify the district adjacent in pouring the sewage of the district, or the confluent sewage of much more important districts, into a stream like The New River, from which a large portion of the Metropolis derives its supply of water. One would expect that such a power as this, if conferred on a District Board or vestry, would be at least given by express words, but no such words are to be found in the 18 & 19 Vict. c. 120, under which the defendants

justify. Then if the power exists at all, it exists by inference. It is accordingly urged that the statute is imperative to compel the vestry or Board to effect the drainage, and that the drainage in this case cannot be otherwise effected. Therefore it is said that by inference the power is given. The necessity does not appear, nor indeed can it be said that the necessity exists in the strict sense of the word. Absolute physical necessity there cannot be. The sewage might be removed in carts or suitable vehicles, however expensive the process. Nor does necessity in the lowest sense of the term exist, that is a necessity of doing the thing or of accepting an alternative so expensive as to be commercially impossible. For, by sect. 89, the District Board have the option of turning over the drainage to the Metropolitan Board, who have the power to cut an artificial drain which may effectually and harmlessly [*135] dispose of the sewage in the common stream. It is further alleged that the power to give compensation for interference with a stream and the right to the use of the water, implies a power to pollute the water to any extent and to any distance. Those provisions may well apply to cases where there has been an interference with, or a temporary use of the water, rightly or wrongly, with or without license, because the power to take a mill and employ the water are both alike made the subject of purchase, not indeed of compulsory purchase, but of purchase where the contract is the voluntary act of the party. The Act confers no compulsory power on these District Boards to purchase land. These reasons might go far to negative an inference that the District Board could turn this sewage into a stream even within their own district, but they are stronger to show that they cannot do so beyond their own limits.

CHANNELL, B.—I am of opinion that the judgment of the Court of Queen's Bench should be reversed. I was not aware that it was intended to dispose of the case to-day, and therefore have not prepared a written judgment as some of my learned brethren have done; but I do not entertain any such doubt as would justify me in delaying to express the opinion I have formed. We are not called on to determine what power the Metropolitan Board might have in such a case as that now before us, but whether the vestry or District Board have the power in question, and I am of opinion they have not.

The case for the defendants has been principally based on the 86th section of The Metropolis Local Management Act, 18 & 19 Vict. c. 120. The judgment which we are called on to review is founded on that [*136] section, and the question mainly depends on the interpretation to be put upon it. I have looked carefully through the other sections. If the case is not within the power given by the 86th section, I do not find there is anything in the statute to warrant the acts which the defendants have done. It appears to me that the enacting part of the 86th section does not justify them. Great stress was laid on the second proviso, but I am of opinion that neither of the provisos apply to any case which is not hit by the introductory words of the section. The two provisos may well stand consistently with the construction which I think the true one with respect to the proceedings which are justified by the enacting part of the section. Two courses are open to the District Board, either to do the act, making compensation to the party after the act has been done, or, which in various cases would be

the better course, to endeavor to contract with the party whose water-right will be interfered with or prejudicially affected for the purchase of it. I am struck by the view of my brother Byles, that if such a power as this had been intended to be conferred it would have been conferred by express or direct words. There are no express words, nor do I see any words from which such a power can be implied.

For these reasons I am of opinion that the plaintiff is well entitled to maintain his action, and is not driven to demand compensation, and our judgment should be in his favour.

BRAMWELL, B.—I also was not aware that judgment would be given to-day, or I would have endeavoured to write one: because, as I am of *187] opinion that the judgment *of the Court below should be reversed, it would have seemed more respectful to the Court below to have done so.

My opinion proceeds on the grounds stated by my brothers Byles and Channell. No power is given in express words by The Metropolis Local Management Act, 18 & 19 Vict. c. 120, to do what the defendants have done to the plaintiff's stream, and we should not expect such a power to be given by implication, when we find that no power is given in express terms to purchase land compulsorily; for it would be singular if, though they cannot take a man's land, they had power by implication to pollute his stream. And it is manifest that whatever reasons may be given for doing what they have done to the plaintiff's stream might be given for doing the same thing to a pond in his field. If this power is rested on the ground of convenience, I cannot see why they should not have a right to turn the sewage into one of his fields which may lie low, and leave it there to find its way out. Still, the power may be given by implication; and it is said that it is so given in section 69, which directs the District Board to "cause to be made, repaired, and maintained such sewers and works, &c., as may be necessary for effectually draining their parish or district." But, first, it does not appear that they could not do this in some other way. Secondly, supposing they could not, if they have a right to turn the sewage into a brook, they have a right to turn it into any other land or place convenient for the purpose. Thirdly, they may apply to the Metropolitan Board if they cannot otherwise do it. Fourthly, if neither they nor the Metropolitan Board can do it, and it is not possible, the Legislature does not order an impossibility, and the statute *138] must be *construed as requiring them to do it only so far as it is possible. Therefore, I do not construe this section as giving the defendants by implication a power to take a man's land, or foul or spoil it, or pollute his pond or stream, as they have done in this case. That view is much confirmed to my mind by certain words in the 69th section (and here, though I do not wish to find fault with the framer of the Act, I cannot help observing on the looseness of the language); the District Board may carry sewers "through, across, or under any turnpike road, or any street or place laid out as or intended for a street, or through or under," leaving out the word "across," "any cellar or vault which may be under the pavement or carriage-way of any street, and into, through, or under," introducing the word "into" and leaving out the word "across," "any lands whatsoever." The "into, through, or under," manifestly does not mean that they should carry the sewer into the lands and there leave it: it must therefore be read "into, and through,

and under ;" therefore they are to take it in, and must take it out either "through or under." The argument for the defendants is, that they have a right to take it into the land and leave it there except so far as by the laws of gravitation or otherwise it may flow off.

Then by section 86, on which much reliance was placed, more by my brother Pigott than by the counsel for the defendants, where there is an existing nuisance the District Board may abate it: they "shall drain, cleanse, cover or fill up, or cause to be drained, cleansed, covered, or filled up, all ponds, pools, open ditches, sewers, drains and places containing or used for the collection of any drainage, &c., of an offensive nature, or likely to be prejudicial to health," and shall cause notice to be given *to the person causing such nuisance or to the owner [*139 or occupier of any premises on which the same exists, requiring him to abate it, and if he does not they may execute the works necessary for the purpose. It is said that the ditches and sewers in the plaintiff's land were an existing nuisance, and that the District Board have a right to abate it. So be it. But they must abate it without infringing the plaintiff's rights of property, unless power is given to them to do so in express words. The introductory part of the section does not authorize them to do what they have done. Nor do they say that they have done it for the purpose of abating the nuisance, nor that they have given the notice mentioned in the section to the person on whose land the nuisance existed. Clearly, therefore, that part of the section would not justify them in what they have done. I agree that the second proviso is more extensive than the introductory part of the section, that is to say, the proviso includes cases which are not within the introductory part:—"Provided also, that where any work by any vestry or District Board done or required to be done in pursuance of the provisions of this Act,"—I admit that does not mean in pursuance of the immediately preceding provisions, but generally the provisions of this Act,—prejudicially affects any right to the use of water, compensation is to be made as a matter of right to the person whose water-right is prejudicially affected. It is said that shows the District Board may do acts which prejudicially affect a water-right, and consequently, by implication, shows they have this power. I do not desire minutely to criticise these words "done or required to be done,"—but I cannot help calling attention to them. Do they mean *"done when not required," and "required to be done though not done?" [*140 There is great looseness of language here. Probably the intention of the draftsman was put to a mere proviso on the introductory part of the section; then it occurred to him or to some one else, why not say generally that wherever damage is done by the exercise of the powers given by the Act compensation shall be made? Without interpolating words, one may fairly read this proviso as if it had said, "where any work done or required to be done by any vestry or District Board in pursuance of the provisions of this Act, if any can be done, except as aforesaid." It seems to me contrary to the ordinary principles of construction to hold that a proviso, saying that the District Board shall make compensation where they do what they may do, imports that they may do something which otherwise they could not do. I think therefore that the proviso does not itself confer the power, nor show that the power is conferred by any of the preceding sections. There-

fore the direction given to the District Board by sect. 69 to make drains does not confer this power, nor is it given by implication under the 86th section. It has not been suggested that on any other ground they possess it. They cannot have it as incidental to their duties unless it is given to them.

The Court below seem to have assumed that this point was generally speaking against the plaintiff, that is to say, that the District Board had such a power, provided it was in their district; and their attention was mainly directed to the point, whether the fact of this being out of the district made any difference. Mr. *Lush* has told us that the point on which he now relies, if made, was very faintly made in the Court below; *141] *Therefore, in expressing my opinion that their judgment should be reversed, I may observe that, if their mind had been directed to this question, they might have formed the same opinion.

KEATING, J.—I also have not prepared a written judgment for the reasons stated by my brothers Channell and Bramwell; but am of opinion that the judgment of the Court below ought to be reversed. There is nothing in the case stated to us which raises the ground of necessity for the execution of these works, and Mr. *Mellish*, though not exactly relying on the argument of necessity, certainly pressed it as a reason why it was probable that the Legislature should have given the power contended for. I agree with the observations made by the other members of the Court who are for reversing the judgment as to the construction of the 86th section of The Metropolis Local Management Act, 18 & 19 Vict. c. 120. It seems to me clear that the proviso does not extend the powers of the District Board beyond those given in the enacting part: that section, therefore, does not confer this power. It would be a strong thing, in the absence of express words, to put on the statute a construction which would enable the Board to deal with the property of an individual in this manner. If they have a right to discharge the sewage into the plaintiff's stream they might, under the same power, have passed it over his land. It is said that they are bound to make compensation for any injury they do; but this is not a case in which compensation can properly redress the injury which has been done. That, however, does not affect the construction of the statute. I *142] was struck with the argument of Mr. *Lush* that, under sect. 86, *the power of the District Board is to abate a nuisance, and that under this power they seek to justify the act which they have done here; and it does seem strange that, having the power to abate a nuisance, they should exercise it so as to create a nuisance on the plaintiff's land which he might possibly be called on to abate. It is said that compensation might be given which would enable the plaintiff to abate it, but it could not have been contemplated by the Legislature to attribute compensation to an injury of this kind.

For these reasons, and those which have been given by the other members of the Court, I am of opinion that the judgment ought to be reversed.

POLLOCK, C. B.—I am of opinion that the judgment of the Court below ought to be affirmed. It is true that, in giving that judgment, the Court expressed some hesitation. They took considerable time in arriving at the conclusion which at last they delivered, for it appears that the case was argued in Trinity Term, 1863, and the judgment was

not given until the 22d February, 1864. I am not prepared to reverse that judgment, and it appears to me, with deference to the rest of this Court, that the view which the Court below has taken on the subject is the correct view. With respect to what my brother Byles said as to The New River, it appears to me to be beside the question. The New River is strictly private property, and is not under the management of a public Board; and, so far as I know, has not a single drain running into it from the fountain head, in the town of Ware, down to the reservoir in Islington, from which it is diffused over a large district of London. That is the reverse of the state of things *which has been the foundation of the judgment of the Court below. The streams in [*143 question, namely, The Poole River and The County Bridge Stream, had been used as drains for this district, both for surface water and offensive matter, but under circumstances which at the time rendered the drainage into those streams not an appreciable nuisance. And it cannot be much doubted that if, instead of obeying the Act of Parliament, as I think the District Board have done, they had allowed the houses to increase and the quantity of sewage and filth to accumulate and flow down, time would have done that which they have done. Where there is the drainage of the surface water from a brook into a stream, which flows into another stream and so on into the ocean, if at any part of its course it passes through an increasing neighbourhood, of necessity the multiplication of inhabitants, and the various occasions of social life, make that drainage a nuisance which originally was as harmless as the drainage of a farm-house into a rural stream, which may find its way into the River Thames. What the District Board have done is this. They have so constructed the drains as to enable them to carry off, not merely that which heretofore was carried off, but that which ought to be carried off in order to render the district healthy, which otherwise would become unwholesome. The effect of this has been, not to do any new act, but to increase the drainage which before existed, and to make that appreciably a nuisance which before was not so. That is the foundation of the judgment of the Court of Queen's Bench; and I think it was perfectly right, and ought to be affirmed.

ERLE, C. J.—The declaration is for fouling two *streams of the plaintiff. The defendants plead that the acts complained of [*144 were done in exercise of the powers given to them by The Metropolis Local Management Act, 18 & 19 Vict. c. 120.

The facts were, that before 1852 the houses in the district were few, and the sewage from them passed into open watercourses, which joined these streams but did not foul the water to an appreciable extent. If sewage there was, it probably soaked away. After 1852 The Crystal Palace increased the quantity of sewage, and it passed in the same watercourses and fouled the water of the streams to an appreciable but not a serious extent. Between 1852 and 1859 the houses increased, and the watercourses became a serious nuisance from the accumulation of filth therein. The defendants, both to put an end to this nuisance, and also to provide efficient drainage for the whole district, and for The Anerly Building Society's houses, caused a number of underground sewers to be made, and arranged so that the outfall for the sewage of the whole district should be at the same place where the old watercourses came.

This new system of sewers has prevented the accumulation of filth in the open watercourses, but the quantity of filth carried into the streams is greatly in excess of what had reached it before the new sewers were constructed, and has rendered those streams foul, stinking, and wholly unfit for cattle or domestic use. The outfall of the watercourses is at the boundary of the defendants' district, the fouling of the streams takes place out of the district. The defendants, in covering the watercourses, acted in pursuance of the powers given by sect. 86, and if any damage arose from such covering, it would be the subject of compensation under that section.

*145] *But the question arises in respect to the deposition, in the plaintiff's streams, of a large quantity of sewage brought there by the new system of sewers for the district made by the defendants, as to which it is admitted that an action lies unless the defendants were empowered by their Act to make that deposit. Then does the Act give that power? Sect. 86, empowering the defendants to cover open watercourses that are a nuisance, gives no power to use the land or water of other persons for the purpose of receiving sewage, except by agreement. It is clear from the facts stated that no prescriptive right of fouling the water by twenty years' usage had been gained by any one; the defendants therefore had no right of outfall for the sewage they collected into the plaintiff's streams unless the Act created it, and I can find no such right given either by this or any other sections of the Act.

Sect. 86, after requiring drains to be covered so that nuisances should be removed, goes on to provide, that where any work by any District Board done or required to be done, in pursuance of the provisions of this Act, prejudicially affects any right to the use of water full compensation shall be made in the manner thereafter provided, or the Board may contract for the purchase of such right in the manner provided for other purchases of rights. If the defendants had done no more than covering the open watercourses, and so removing the existing nuisance, they would have acted in pursuance of the powers given by sect. 86, and the remedy for the plaintiff would have been compensation merely; but as they have made a new system of sewers, and thereby collected a much larger quantity of sewage than reached the plaintiff's streams *146] before, and caused that quantity *to fall into those streams, they have exceeded their powers and are liable to an action. The other sections of the Act are framed in accordance with this construction. Sect. 69 gives the general power over the sewers in the district. Thereby the District Board are required to repair and maintain the sewers vested in them, and to cause such alterations of sewers to be made as may be necessary for effectually draining their district, and it is made lawful for the District Board to carry any sewer under any highway or under any lands whatsoever, making compensation for any damage done thereby in the manner thereafter provided. Sects. 150, 151, 152, provide for the compensation to be made if any land or any right or easement in or over any land is taken. Sect. 150 enables the Metropolitan Board and every District Board to take any land or any right or easement in or over any land which may be necessary for the formation or protection of any works which they are authorized to execute under the Act. Sect. 151 enacts that the provisions in the Lands Clauses Consolidation Act, 1845, shall, subject to the provisions in this

Act, be incorporated therewith for the purpose of enabling the Metropolitan Board and every District Board to take land or any right or easement in or over land; and sect. 152 provides that the provisions of The Lands Clauses Consolidation Act, 1845, "with respect to the purchase and taking of lands *otherwise than by agreement*," shall not be incorporated with this Act, save for the purpose of enabling the Metropolitan Board to take land, or any right or easement in or over any land. From these provisions it is clear that the District Board cannot take land or any right or easement in or over land by compulsion, they can take only by agreement; *thus, they could not acquire the easement of depositing sewage in the plaintiff's streams unless [*147 by agreement with him as proprietor of the streams.

I am confirmed in this construction of the Act by considering the other sections to which Mr. *Lush* referred us: sections containing provisions for vesting trunk sewers in the Metropolitan Board, with proper outfalls, and enabling District Boards to connect branch sewers with these trunk sewers, and also provisions enabling any District Board to give up to the Metropolitan Board the branch sewers in their district, if they think right, and the Metropolitan Board has powers both in and beyond their district, to take lands both by compulsion and by agreement so as to dispose of the collections of sewage. If the defendants could maintain the right they have claimed, the plaintiff would probably be liable at his own expense to cover his streams so as to prevent a nuisance, in other words to be at the expense of making a sewer to carry off the sewage of the defendants' district. Also, if the defendants can maintain this right, they would permanently deteriorate the value and enjoyment of the plaintiff's property for residential and agricultural purposes, and would in effect produce a sale by compulsion which the statute has expressly excluded. The power to purchase streams that may be fouled, which is given by sect. 86, is subject to the provisions with respect to purchases by the District Board above mentioned; that is, they can purchase by agreement only and not by compulsion, when damage has been caused by a work done in exercise of the powers given by the Act.

For these reasons, I am of opinion that the defendants, in doing the act complained of, were not acting in *pursuance of the powers [*148 given by the statute. Therefore the plaintiff has a right of action, and is not restricted to a right of compensation.

In this judgment, I consider the point relied on in the Court below, viz., that the damage was done to the plaintiff out of the district of the defendants, to be immaterial. The ground of my judgment is on the point on which Mr. *Lush* relied as above explained, and which does not appear to have been pressed on the attention of the Court below; in respect of that point the *place* of the damage makes no difference.

Judgment reversed.]

MEMORANDA.

In this Vacation,

David Deady Keene, Esq., of the Middle Temple, *John James Johnson*, Esq., of the Middle Temple, and *William Field*, Esq., of the Inner Temple, were appointed of Her Majesty's Counsel learned in the law.

John Humffreys Parry, Serjeant at law, received a patent of precedence next after Serjeant *Ballantine*.

John Simon, Esq., of the Middle Temple, was advanced to the degree of the coif, and gave rings with the motto "In concilio justorum."

Alexander Pulling, Esq., of the Inner Temple, was advanced to the degree of the coif, and gave rings with the motto "Jura servare."

Henry Tindal Atkinson, Esq., of the Middle Temple, was advanced to the degree of the coif, and gave rings with the motto "Vincit qui patitur."

END OF HILARY VACATION.

CASES
ARGUED AND DETERMINED
IN
THE QUEEN'S BENCH,

Easter Term,

XXVII. VICTORIA. 1864.

The Judges who usually sat in Banc in this Term were :

COCKBURN, C J.,
BLACKBURN, J.,

MELLOR, J.,
SHEE, J.

RICKET v. The METROPOLITAN Railway Company. April 22.

Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68.—House “injuriously affected.”—Loss of custom.—Compensation.

The plaintiff was lessee of a public-house, situate in Crawford Passage: between Crawford Passage and Coppice Row was a public footway opposite the public-house and facing Bowling Green Lane across Coppice Row. The defendants, a railway Company, in the exercise of powers under their Acts, formed a tunnel under Coppice Row, being part of the railway which they were authorized to make, and put up a hoarding on each side of Coppice Row, and placed steps to enable the foot passengers to pass up on one side and down the other side of a bridge over the hoarding; and after twenty months restored the highways, footways and passages to their original state. Upon an inquiry before a jury summoned under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. s. 18, s. 68, the plaintiff gave evidence that immediately after Coppice Row was obstructed in front of Bowling Green Lane and the footway the number of passengers passing to and fro along Crawford Passage diminished, the custom to and trade of the public-house fell off, and did not again improve after the hoarding was removed, the traffic of the neighbourhood having been entirely altered by the railway works. The jury found that there was no damage done to the structure of the house or premises of the plaintiff, but that with respect to the claim for loss of profits he had sustained damages, which they assessed. In an action to recover that amount, held, per Erle, C. J., Pollock, C. B., Channell and Pigott, BB., reversing the judgment of the Queen's Bench, consisting of Cockburn, C. J., Blackburn, Mellor and Shee, JJ.; Byles and Keating, JJ., diss.; that the loss of custom occasioned to the plaintiff by the railway works was not an injurious affecting of his house within sect. 68, and therefore he was not entitled to compensation.

In Michaelmas Term, 1862, *Hawkins* obtained a rule, at the instance of The Metropolitan Railway Company, calling upon the plaintiff to show cause why a writ of certiorari should not issue to remove an

inquisition, and the verdict and judgment thereon, upon a claim for compensation by him against the Company; and in the meantime proceedings were stayed. In the same Term by consent it was ordered that the facts should be stated in a special case, and the rule be enlarged. Afterwards the plaintiff issued a writ of summons for recovering the sum of 100*l.*, the amount of compensation assessed by the jury; and, under The Common Law Procedure Act, 1852, the following case was stated without pleadings.

The Metropolitan Railway Company is the Company mentioned in their special Acts, 17 & 18 Vict. c. ccxxi., The Metropolitan Railway Act, 1854; 18 & 19 Vict. c. cii., The Metropolitan Railway (Deviation) Act, 1855; and 19 & 20 Vict. c. xix., The Metropolitan Railway (Great Northern Branch and Amendment) Act, 1856; and those Acts incorporated The Companies Clauses, The Lands Clauses and the Railway Clauses Consolidation Acts, 1845; 8 & 9 Vict. cc. 16, 18, 20.

The plaintiff is the lessee of a public-house called The Pickled Egg, situate in Crawford Passage, in the parish of St. James, Clerkenwell, in the county of Middlesex, for the residue of a term of twenty-one *151] years, commencing *on the 25th March, 1857, and during the time after mentioned occupied as such lessee the public-house, and carried on therein the business of a licensed victualler.

A plan which accompanied and formed part of the case showed and described the public-house and the streets and passages in its immediate neighbourhood by their respective names, such streets and passages being all public highways and thoroughfares.

The Company, in the due exercise of their powers under the above Acts, formed a tunnel under Coppice Row, being part of the railway which they were by those Acts authorized to make. In the course and for the purpose of constructing the tunnel and such exercise of their powers they necessarily and unavoidably caused a temporary obstruction of parts of the carriage road in Coppice Row, and placed a boarding on each side of such parts of the carriage road. One of the parts so obstructed faces Bowling Green Lane towards the north and the covered passage or public footway after mentioned towards the south. The footway in Coppice Row was not thereby obstructed. The Company constructed a bridge, by which foot passengers could cross over Coppice Row from one footpath to the other. The obstructions were continued for such time only as was necessary to enable the Company to construct their tunnel, that is to say, about twenty months, and the obstructions were then removed by the Company, and the streets, highways, footways, and passages, restored to their former state.

The plaintiff's public-house abuts on Crawford Passage, but does not adjoin nor has it any connection with Coppice Row, other than by means of the above-mentioned streets and public footways, and it is 87 feet *152] *distant from the nearest point in Coppice Row through the public footway opposite the public-house, which is only a passage for persons on foot, and is 76 feet long and 5 feet wide, enclosed by walls on the east and west, and covered over by part of the first floor of Clerkenwell Workhouse, and faces Bowling Green Lane.

After the highways, streets, footways, and passages had been so restored, the plaintiff claimed compensation from the Company by a notice in writing, stating that his public-house had been injuriously

affected by the execution of the works of the railway; but the Company disputed their liability to make such compensation, and they issued their warrant, and on the 6th of October 1862, the question was tried by a jury before the under-sheriff of Middlesex, by virtue of The Lands Clauses and The Railway Clauses Consolidation Acts, 1845.

At the inquiry the plaintiff adduced evidence to show that the structure of the public-house was injuriously affected by the execution of the works of the Company, and also to show that the public-house was deteriorated in value, and his occupation thereof made less profitable than theretofore by reason of the obstructions. It was shown that long before and up to the time of the hoarding being erected, foot passengers came to his house from Hoxton, Islington, the City Road, Goswell Street, and a variety of places north and east of Coppice Row from Bowling Green Lane, across Coppice Row, into and down the covered footway or passage, and persons passed and repassed towards and from Holborn and places beyond, and that there was no nearer way from Hoxton to The Pickled Egg, and that the principal part of the trade of the public-house was derived from customers attracted to the public-house by a skittle ground attached thereto, *and coming through [*153 the thoroughfare from Bowling Green Lane and passing his house. That immediately after Coppice Row was obstructed in front of Bowling Green Lane and the covered footway or passage, the number of foot passengers coming towards the public-house was greatly diminished, and the custom to and the trade of the public-house greatly fell off, and did not again improve whilst the hoarding continued in Coppice Row, or after it had been removed and the thoroughfare restored, the traffic of the neighbourhood having been entirely altered by the railway works.

The undersheriff left to the jury two questions: First. Whether the structure of the house and premises or any part thereof had been injured or injuriously affected by the railway works, or by the execution of any of their works; and Secondly. With respect to a claim for loss of profits, whether, by reason of the obstruction of the carriageway of Coppice Row, the plaintiff had sustained any particular damage or injury.

The jury found that there was no damage done to the structure of the house or premises, but that the plaintiff had sustained damage in respect of his other claims, and they assessed the amount thereof at 100*l*.

The question for the opinion of the Court was, Whether the loss of customers by the plaintiff in his trade, under the above circumstances, was such damage as entitled him to recover compensation from the Company?

Keane, for the plaintiff.—The loss of customers by the plaintiff in his trade, caused by the obstruction of the footway, is such an injurious affecting of his house as entitles him to compensation under The Lands Clauses *Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68: Senior [*154 *v. The Metropolitan Railway Company*, 2 H. & C. 258, founded on *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 B. & S. 605 (E. C. L. R. vol. 110); (a) and the damage here is not so remote as in *Senior v. The Metropolitan Railway Company*. [COCKBURN, C. J.—In that case one of the thoroughfares

(a) Affirmed in error, 2 B. & S. 617.

leading to the plaintiff's house was for a considerable time stopped up. We must see that the falling off of the custom was the necessary consequence of the acts of the defendants, and not merely from the amenity of the access to the plaintiff's house being less. BLACKBURN, J.—The undersheriff left to the jury the question, whether by reason of the obstruction of the carriageway the plaintiff had sustained any particular damage or injury?]

Rochfort Clarke (*Hawkins* with him), for the defendants.—Under the words “injuriously affected” in sect. 68 of The Lands Clauses Consolidation Act, 1845, compensation for loss of custom arising from diversion of traffic is not recoverable unless there has been damage to land or to an hereditament equivalent to land. In *Chamberlain v. The West End of London and Crystal Palace Railway Company*, there was actual injury to the premises of the plaintiff: as also in *Moore v. The Great Southern and Western Railway Company*, 10 Irish Com. Law Rep. 46, and *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 437. [He referred to *The Caledonian Railway Company v. Ogilvy*, per Lord *155] *Cranworth*, 2 Macq. 229, 235.] Here *was diversion only of a highway; the case states that the footway in Coppice Row was not obstructed. [COCKBURN, C. J.—We must take the jury to have found facts which would warrant their finding for the plaintiff under sect. 68, namely, obstruction of the footway and injury arising therefrom to the plaintiff, and according to the decided cases those facts entitle him to compensation.] The question is whether the facts warranted the finding of the jury. [COCKBURN, C. J.—Then the verdict of the jury ought not to have been introduced into the case; and we ought to have been left to draw inferences of fact.]

COCKBURN, C. J.—The finding of the jury brings the case within the principle of *Senior v. The Metropolitan Railway Company*, and *Chamberlain v. The West End of London and Crystal Palace Railway Company*.

BLACKBURN, J.—There being an obstruction of the footway, if damage arose to the plaintiff from that an action would lie and the plaintiff would be entitled to compensation. If there were no obstruction, but merely a diversion of the footway which deterred persons from passing along it, as at present advised I think it would not be actionable, and the plaintiff would not be entitled to compensation.

MELLOR and SHEE, JJ., concurred.

Judgment for the plaintiff.

•156] *IN THE EXCHEQUER CHAMBER.

RICKET v. The METROPOLITAN Railway Company.
[Feb. 8, 1865.]

For head-note, see ante, p. 149.

THE defendants brought error upon the above judgment.
The case was argued, in Michaelmas Vacation, 1864, November 28th, by

Hawkins (*Rochfort Clarke* with him), for the defendants, and *Keane* for the plaintiff.

Hawkins, in addition to the grounds upon which the Court reversed the judgment of the Court below, contended that the damage was too remote, and that, the obstruction being temporary only and while lawful works were in the course of construction, was not a ground for compensation.

Keane, in addition to the cases mentioned in the judgments of the Judges reversing the decision of the Court below, cited *Rose v. Groves*, 5 M. & G. 613 (E. C. L. R. vol. 44); *The London and North Western Railway Company v. Smith*, 1 Mac. & G. 216; *The East and West India Docks, &c., Company v. Gattke*, 3 Mac. & G. 155, the judgment of Pollock, C. B., in *Bamford v. Turnley*, in error, 3 B. & S. 66, 79 (E. C. L. R. vol. 113). *Cur. adv. vult.*

*ERLE, C. J., delivered the following judgment, in which [*157 POLLOCK, C. B., CHANNELL and PIGOTT, BB., concurred.

In this case the facts were these. The plaintiff was lessee of a public-house, situate in Crawford Passage. Along Crawford Passage, across Coppice Row, was a public footway. The defendants, for the purpose of their works, placed a hoarding in Coppice Row, and placed steps to enable the foot passengers to pass up on one side and down the other side of a bridge over the hoarding, and did all this in accordance with their duty under their statutes, and after twenty months restored the premises to their original state. After this bridge had been so erected the number of passengers passing to and fro along Crawford Passage diminished: the refreshment sold by the plaintiff was diminished in proportion, and the jury must be taken to have found that the bridge and steps formed the motive which turned the passengers to another direction and prevented the sale of refreshment which would otherwise have been bought by them, and so caused the loss of profit.

These being the facts, the question is raised whether the plaintiff is shown to be entitled to compensation in respect of land or any interest therein which has been injuriously affected by the execution of the defendants' works. The plaintiff contended that a house was injuriously affected within the statute by that which caused a loss in the trade carried on in the house; and he further argued that a damage to the good-will of the trade carried on in this house ought to be held to be an injurious affection of the house within the statute, because, if the house had been taken by the defendants under the statutes, the good-will of the trade carried on in it at the time would have been a subject for compensation *according to usual practice; and he cited *Cham-* [*158 *berlain v. The West End of London and Crystal Palace Railway Company*, 2 B. & S. 605 (E. C. L. R. vol. 110), (a) and two cases founded thereon, namely, *Senior v. The Metropolitan Railway Company*, 2 H. & C. 258; *Cameron v. The Charing Cross Railway Company*, 16 C. B. N. S. 430 (E. C. L. R. vol. 111).

For the defendant it was contended, first, that upon these facts, if there had been no statute for the defendants, the plaintiff would have had no cause of action against them for special damage caused by the obstruction of a highway, and if there would have been no cause of action there was not a right to compensation. And, secondly, that even

(a) Affirmed in error, 2 B. & S. 617.

if upon these facts an action could have been maintained for such special damage if there had been no statute, still the plaintiff is not entitled to compensation because the special damage is to his personal interest in his stock in trade and not to his estate in land, no compensation being given unless land or an interest therein has been injuriously affected.

As to the first point, viz., that upon these facts, if there had been no statute for the defendants, the plaintiff would have had no cause of action against them for special damage caused by the obstruction of a highway, we assume it to be clear that there is no title to compensation under the statutes for an obstruction of a highway unless without the statutes an action would have lain for the obstruction and the special damage, according to *Re Penny and The South Eastern Railway Company*, 7 E. & B. 660 (E. C. L. R. vol. 90). We assume further that although the action would lie, it does not follow that there would be title to compensation, because the action would lie for a special damage *159] to a personal interest, but no compensation is *given under the statute unless *land* has been injuriously affected. See Lord Cranworth's judgment in *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229, 235.

Then, first, do these facts show that an action would have lain? The action lies where the exercise of the right of way by or on behalf of the plaintiff has been obstructed, and a greater damage has been caused to him thereby than is caused to the Queen's subjects in general by obstructing them in the exercise of their right. This position is not disputed, but the following cases exemplify its application. In *Iveson v. Moore*, 1 Ld. Raym. 486, the plaintiff was prevented by the defendant's obstruction of the highway from using the way for carting coals from his colliery, which coals were deteriorated by the delay: in this case the law on actions for obstruction of highways is well discussed. In *Maynell v. Saltmarsh*, 1 Keb. 847, the plaintiff was prevented by the defendant's obstruction from carrying his corn, and so the corn became damaged by rain. In *Hart v. Basset*, T. Jones 156, the plaintiff, a farmer of tithes, was prevented by the defendant's obstruction from carrying them home; and several grounds of special damage are suggested by Lord Holt in *Iveson v. Moore*, 1 Ld. Raym. 494-5. In *Fineux v. Hovenden*, 2 Cro. El. 664, the special damage mentioned as an example is damage caused directly by the obstruction of the plaintiff in the use of the way. In *Greasly v. Codling*, 2 Bing. 263 (E. C. L. R. vol. 9), the plaintiff was prevented by the defendant's obstruction from carrying his coals. In *Paine v. Partrich*, Carth. 191, the plaintiff's damage was not actionable, and the example of actionable damage is *160] put thus, p. 194, "a *particular damage to maintain this action ought to be direct, and not consequential; as for instance; the loss of his horse, or by some corporal hurt, in falling into a trench in the highway." In *Chichester v. Lethbridge*, Willes 71, the obstruction was held actionable because the plaintiff was personally opposed by the defendant in an attempt to abate the obstruction and use the way. In *Rose v. Miles*, 4 M. & S. 101, the plaintiff was obstructed in his use of the navigable water, and was damaged by being obliged to unload his barge and carry the goods overland. In all these cases the plaintiff was exercising his right of way and the defendant obstructed that exer-

cise, and caused particular damage thereby directly and immediately to the plaintiff.

Here there has been no obstruction to the exercise of the right of way by or on behalf of the plaintiff; neither he himself, nor any one standing in a legal relation to him, such as servant, agent, tenant, or any other legal relation which gives to the plaintiff a legal interest in their use of the way has been obstructed. But some unknown travellers having a free option to pass from north to south, either by Crawford Passage or any other pass, have chosen some other pass because they did not like the steps at Coppice Row; the plaintiff has no cause of action against the defendants by reason of any obstruction direct to himself; the travellers who have chosen to turn out of their path to avoid the steps have no cause of action against the defendants in respect of the obstruction; and it seems unreasonable that an obstruction which created no cause of action, either for the plaintiff or for the travellers separately, should, by indirect consequence, become a cause of action to the *plaintiff, because the travellers exercised their choice as to their path and as to their refreshment, a choice in which the plaintiff had no manner of legal right. [*161

The plaintiff relied on *Wilkes v. The Hungerford Market Company*, 2 Bing. N. C. 281 (E. C. L. R. vol. 29), as an authority in his favour. The case was argued, and the judgment is on the point that the action lay for the loss of custom to a shop caused by the obstruction of a highway at some distance therefrom. It must, however, be observed that the case is peculiar; the obstruction complained of in the declaration was lawful by the special statute of the defendants, but this defence was overruled, because a substituted way had not been opened before the stoppage, and ultimately the action was sustained on the ground that there had been unreasonable delay in removing a hoarding which was lawful in its inception but was continued too long, in respect of which it is not clear that an indictment would lie, and although the damage appears to be indirect, and the cases above cited were referred to, leading, as it seems to us, to a decision in the defendants' favour, the Court gave judgment for the plaintiff, and held the loss of profit to be the direct, natural and immediate consequence of the obstruction.

We have found no other precedent of an action having been maintained on an obstruction of a highway where the plaintiff was not obstructed in the exercise of any right vested in him, and the damage was not a more direct, natural and immediate consequence of the obstruction than appeared in *Wilkes v. The Hungerford Market Company*. If the same question was raised in an action now, we think it probable that the action would fail, both from the effect of the cases that *preceded [*162 *Wilkes v. The Hungerford Market Company* and also from the reasoning in the judgment in *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229. There a railway crossed a highway on a level, and the highway was stopped by two gates for trains to pass, and the plaintiff lived near those gates and suffered frequent inconvenience, but the judgment is that he could maintain no action for this inconvenience,—it is the delay common to all who are exercising their right at that time; and although from his proximity the inconvenience to the plaintiff is frequently repeated, yet it is always the same in kind, and so not actionable special damage, and, because an action would not have lain,

therefore the plaintiff had no right to compensation from the railway Company; and Lord Cranworth adds the limitation above suggested that, even if an action lay, still that compensation would not be due unless the injury was to the land.

These are our reasons that an action would not have lain, and so the claim for compensation fails.

But, secondly, even if the action would lie for this obstruction, whereby the plaintiff was damaged in his trade, still such damage did not accrue to the plaintiff in his capacity of owner of an estate in land, and the title to compensation to which the statute relates is only in respect of land, or an interest therein which has been injuriously affected. Here the plaintiff has a term in the house, and the point is whether the house is shown to be injuriously affected, because the profits of the plaintiff's trade carried on therein are diminished by reason of the obstruction. The trading carried on in the house is entirely distinct from the *163] estate in the *house,—the procuring of refreshment and the sale thereof, and the profit thereon, may either continue or cease without affecting the plaintiff's interest in the house. If his license were taken away the business would cease, but the house and the estate therein would be the same as before; and it is clear that an estate in the house is not essential to the sale of refreshment, as many kinds are sold in the street by persons having no interest in the land where they sell; the statute limited the liability to compensation in respect of injuries to definite rights of a permanent nature, that is, to rights in land. The public has a valuable interest in and derives much advantage from the works of public Companies; the capital invested in them is, therefore, protected within certain limits, and we are to see that those limits are not exceeded: and, in support of this view, we refer again to Lord Cranworth's words in *The Caledonian Railway Company v. Ogilvy*, before cited.

As to the argument that compensation is in practice allowed for the profits of the trade *where land is taken* the distinction is obvious, the Company claiming to take land by compulsory process expels the owner from his property, and are bound to compensate him for all the loss caused by the expulsion, and the principle of compensation then is the same as in trespass for expulsion; and so it has been decided in *Re Jubb v. The Hull Dock Company*, 9 Q. B. 443, 457 (E. C. L. R. vol. 58). There a brewery had been taken by the defendants, and the plaintiff claimed to be compensated for the loss of his business as a brewer, and the Court held that he was so entitled expressly on the ground that the premises had been taken; and distinguished that case from *Rex v. The London Dock Company*, 5 A. & E. 163 (E. C. L. R. vol. 31), *164] *where* compensation for loss of custom to a public-house was held to have been properly refused, upon the ground that in the latter case no part of the premises of the claimant had been taken or touched by the Company. But the present claim under sect. 68 of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, is made in respect of lands injuriously affected where no land has been taken; and if it were held that a claim could be sustained for every loss of profit which a jury could attribute to an obstruction of a highway by a Railway Company in the execution of their works, the liabilities in a dense population would be innumerable. The common law limited the remedy for ob-

structions of public rights to indictment, unless there was special damage, to prevent innumerable actions; and the same reason applies in full force to prevent innumerable claims on account of an alleged loss of profit caused by obstructing a thoroughfare.

We consider that the authorities support this conclusion, notwithstanding the recent cases in the three Courts to the contrary, viz., *Senior v. The Metropolitan Railway Company*, 2 H. & C. 258, in the Exchequer, *Cameron v. The Charing Cross Railway Company*, 16 C. B. N. S. 430 (E. C. L. R. vol. 111), in the Common Pleas, and this case in the Court below. For these cases are all founded on the supposed effect of the judgment in the Exchequer Chamber in *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 B. & S. 617 (E. C. L. R. vol. 110), and if that judgment has been misunderstood these cases, so far as they are founded on that misconception, are to be corrected. In *Chamberlain v. The West End of London and Crystal Palace Railway Company* the damages were given by the arbitrator on *account of the damage done to the plaintiff's house by the rail- [*165 way works, and there was no claim and there could be none in respect of loss of actual profits by the obstruction, because the houses had never been inhabited, and some of them were not completed. It is true that the arbitrator gave as a reason for the damage that the number of passengers along the houses in question had been diminished, and that therefore they were less fit to be let for shops, and this reason is referred to in the judgment. But it is certain, if the case is examined, that the houses themselves of the then plaintiff were found to be injuriously affected, and for that injury alone the compensation was awarded. The same principle of compensation which prevailed in that case has been often sustained, and is totally distinct from loss of profits of a trade by an obstruction of a thoroughfare.

The principle is, that the value of a house is affected by the relation of its situation to the adjoining highway, that is, by the convenience of the private rights of ingress and egress from the one to the other, and by the circumstances of the highway itself tending to make it useful and agreeable to the occupier of the house. If a house on a level with a commodious, beautiful, well-frequented street, either be lifted or sunk by the railway 20 feet above or below the level of that street, the house would be injuriously affected, both for pleasure and profit, by reason of the change in the access to and from the house, or if a house fronting to a street of that description should be turned round so as to front to a dark back alley, the house would be injuriously affected. The site of the house would be altered for the worse. In these cases here suggested the house is supposed to *be removed to make the meaning more [*166 clear; but if, instead of lifting or sinking the house, or turning its front from a grand street to a bad alley, the street is lifted or sunk or changed in its character, the relation of the house to its highway is affected precisely to the same degree as it would be by altering the relative position of the house itself in respect of that highway. Such is the principle of *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 B. & S. 605 (E. C. L. R. vol. 110). (a) The frontage had been to a wide well-frequented road leading direct to and from important towns; by the execution of the railway works it was

(a) Affirmed in error, 2 B. & S. 617.

made to front to a dumb alley sunk below the level of the substituted thoroughfare over a railway bridge, along which the stream of passengers would be compelled to flow. Frontage gives the value to building ground; therefore the railway Company took away valuable frontage and substituted that which was very inferior, and therefore it was held that they had injuriously affected the house, both in its frontage and in its access to and from the effective thoroughfare of the locality.

This principle has been acted on in other cases where compensation has been awarded to claimants in respect to their access to the highway being damaged. Thus, in *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 347 (E. C. L. R. vol. 42), the compensation was held to be due to the claimant because his land adjoined the road which had been lowered by the railway company, so that his private right of access to that highway had been injured. To the same effect are the Irish cases: *Moore v. The Great Southern and Western Railway Company*, *167] 10 Irish Com. Law Rep. 46, and **Toohey v. The Great Southern and Western Railway Company*, 10 Irish Com. Law Rep. 98. Upon this principle, also, the case of *Baker v. Moore*, Hil., 8 W. 3, C. B., cited by Gould, J., in *Iveson v. Moore*, 1 Ld. Raym. 491, would have stood if the plaintiff had succeeded; there the defendant built a wall obstructing the access from a street to the Thames, and the plaintiff sued for damage to his houses in the street from the loss of that access, but as he failed to show that he had the houses in the street, he failed in his action. So, also, in *Reg. v. The Great Northern Railway Company*, 14 Q. B. 25 (E. C. L. R. vol. 68), a ferry belonging by prescription to the plaintiff's land was taken away by the railway works, and compensation was granted because the ferry and the access thereto were a private right, and the loss thereof was an injury to the land.

We do not think it useful to make further citations of cases where compensation was granted, and to point out that in each there was injury to an estate in land. The general conclusion which we draw from this review is, that there is no precedent of compensation for an injury to good-will or for a loss of profit in the business carried on upon the land where no land has been taken; that the compensation for the good-will of business carried on upon land actually taken is granted expressly on the ground that the occupier is expelled therefrom, and is distinguished thereby from a claim by an occupier from whom nothing has been taken.

So far the authorities for the negative proposition are clear, viz., that there is no precedent for supporting such a claim as the plaintiff makes. Then *Rex v. The London Dock Company*, 5 A. & E. 163 (E. C. L. R. vol. 31), is a direct affirmative decision on the very point now in question, viz., that a *claimant is not entitled to compensation for *168] loss of profit in his business by reason of the obstruction of the highways in the neighbourhood of his house, whereby the passengers who would have come and purchased refreshment but for the obstruction were prevented from so doing. The decision is that there was no injurious affection of an interest in land although the highways were permanently obstructed without substitution. In that case *Wilkes v. The Hungerford Market Company*, 2 Bing. N. C. 281 (E. C. L. R. vol. 29), was distinguished from the case before the Court, because Wilkes maintained an action for the damage to his trade, and an action is not confined to an injurious affection of an interest in land but will lie for an

injury to the person or personal property caused by the obstruction of a highway. The case of *Rex v. The London Dock Company*, 5 A. & E. 163 (E. C. L. R. vol. 31), has been often cited in all the Courts, and uniformly as a binding decision standing on sound grounds. We would also refer again to *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229, for a judgment on the point that the land is not injuriously affected because a highway leading towards the land is obstructed and thereby inconvenience is caused to the owner and others resorting to the land. We would also refer to *Rex v. The Directors of the Bristol Dock Company*, 12 East 429, as supporting the principle that compensation should not be given for a damage common to the inhabitants of the neighbourhood generally.

These are the affirmative authorities against maintaining the present claim. The words of the statute seem to us to accord with these authorities, limiting the right to compensation to an injurious affection of an *interest in land contradistinguished from injuries to the person [*169 or personal property, and expediency seems strongly on the side of the view we take, namely, that Companies making works which the Legislature has sanctioned on account of their public convenience should be relieved within certain limits from liability to action as well as to indictment in respect of their works.

On these grounds, even if there were no statute for the defendants, and if an action would lie for a loss of the profits of a business, still no compensation is due for such loss of profits as an injurious affection of an interest in land because such loss does not affect that interest.

The result is that the judgment should be reversed on each of the two grounds above mentioned.

CHANNELL, B., read the judgment of KEATING, J., in which BYLES, J., concurred.

I am of opinion that the judgment of the Court of Queen's Bench should be affirmed.

The defendants, in the execution of the works authorized by their Act, interfered with certain approaches to the public house of the plaintiff, rendering the same less convenient, and thereby causing such a diminution in the number of his customers as to cause to him in his business as a licensed victualler damage, which the jury estimated at 100*l.*; and the question is, whether such loss of customers under the circumstances stated in the case can form the subject of compensation within the 68th section of The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18?

That an action would have lain against the defendants by the plaintiff in respect of the injury to his public house by the withdrawal of the customers if the Company had *not been protected by their Act, [*170 I cannot bring myself to doubt. The case of *Wilkes v. The Hungerford Market Company*, 2 Bing. N. C. 281 (E. C. L. R. vol. 29), has never that I am aware of been at all shaken, and appears to me to decide the point, for there is no real difference between that case and the present. So likewise in the case of *Senior v. The Metropolitan Railway Company*, 2 H. & C. 258, which is almost identical in its facts with the present, the Court of Exchequer unanimously held that an action would have lain, as they decided it to be a case for compensation. See also the judgment of Willes, J., in *Cameron v. The Charing Cross*

Railway Company, 16 C. B. N. S. 430, 447 (E. C. L. R. vol. 111). Indeed, the case of *Chamberlain v. The West End of London and Crystal Palace Company*, as decided in the Queen's Bench, 2 B. & S. 665 (E. C. L. R. vol. 110), and affirmed in error, 2 B. & S. 617, seems to conclude the matter, for although in that case the obstruction was permanent, yet that could only be a question of degree upon the point whether an action would lie. In none of these cases were the houses themselves injured, but in all the complaint was of an obstruction interfering with the trade carried on, or which might be carried on therein, and so causing damage by injuriously affecting an interest in the land.

If then the injury found by the jury to have been inflicted upon the plaintiff in this case by the acts of the defendants was injury to his interest in or occupation of land, for which an action might have been maintained against them if they were not protected by their Act, then all the authorities, beginning at least as far back as *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912 (E. C. L. R. vol. 111), show that the case is one for compensation: indeed, the application of such a test to the construction of the statute is in itself so just and reasonable, that it would require strong authority to displace it in favour of another. It was suggested that the observations of Lord Cranworth in the case of *The Caledonian Railway Company v. Ogilvy*, 2 Macq. 229, 235, were opposed to this view, but when the case is looked at it will be found that his Lordship was referring to cases of personal inconvenience and injury not affecting land or any interest therein. So also the case of *Rex v. The London Dock Company*, 5 A. & E. 163 (E. C. L. R. vol. 81), was decided upon the ground that the injury there complained of was not such an injury as the statute then under discussion contemplated; and see the observations of Crompton, J., in *Chamberlain v. The West End of London and Crystal Palace Company*, 2 B. & S. 615 (E. C. L. R. vol. 110), as to the large words now to be found in the compensation clauses of the more recent Acts. An injury to the trade carried on, or, as it may be called, the goodwill of a house is an injury to that which is inseparable from it, and forms part of its nature; as was said by Willes, J., in *Cameron v. The Charing Cross Railway Company*, 16 C. B. N. S. 430, 447 (E. C. L. R. vol. 111), "Damage to a man's interest in land necessarily includes damage to the business which he carries on upon the land, by diverting it from its accustomed channel. Such an interest is not merely personal: it is an interest which a man enjoys in respect of the land,—a reasonable expectation of profit from the exercise of his abilities in some particular place by carrying on business there. *That reasonable expectation of profit is commonly called 'goodwill,' and is a marketable thing;" and in none of the numerous cases which have been decided upon this subject, and in which compensation has been held to be payable in respect of the land being injuriously affected, has the subject-matter of the injury more directly and immediately affected the value of the land than the goodwill of a public house. Indeed, the case of *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 B. & S. 605 (E. C. L. R. vol. 110), before referred to, seems to conclude the present case, for there the arbitrator had awarded compensation (amongst other things) in consequence of the Company having, by interfering with the access to the plaintiff's houses, rendered them less

suitable for shops, as from the obstruction fewer persons would pass that way, and so the value was lessened. It is true the obstruction in that case was permanent, here it was not so; but that circumstance I apprehend makes no real difference in principle between the two cases, for if the injury were direct to the structure of the house itself, its being caused by temporary works of the Company would not render it less the subject of compensation than if caused by works of a permanent character.

Upon the whole, looking to the authorities and words of the statute, in my opinion the Judges of the Court of Queen's Bench in the present case have rightly construed them, and their decision ought to be affirmed.

Judgment reversed.(a)

(a) A writ of error is pending in the House of Lords.

***HODGMAN v. The WEST MIDLAND Railway Com-pany. June 18. [*178**

Railway Company.—17 & 18 Vict. c. 31, s. 7.—Contract.—Delivery of animal.—Appeal under Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 34.

1. A railway Company is entitled to the protection against responsibility for the carriage of animals given by the second proviso in sect. 7 of The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, although no complete contract for carriage of the animal has been entered into, and no complete delivery of it has taken place; it is enough if the animal was in the course of being delivered to or received by the Company; per Blackburn and Mellor, JJ., dissentiente, Cockburn, C. J.

2. A rule to reduce damages is a rule to enter a verdict within The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 34, and consequently gives a right of appeal.

THE declaration stated that the defendants were the owners of the West Midland Railway, and of a certain station upon and adjoining the same at Worcester, used by them, amongst other things, for the reception and conveyance of horses, goods and chattels, from Worcester to London, for reward, and the defendants for their profit kept open the station for the public use to bring thereto horses, goods and chattels, to be carried and conveyed by them upon the railway from Worcester to London; yet the defendants wrongfully and negligently put and placed, and caused to be put and placed, in and upon the station divers large sharp iron girders, and wrongfully and negligently continued the same therein and thereon, and thereby greatly obstructed the station and rendered the same dangerous for the reception of horses brought thereto by the public for conveyance. It then averred that by reason of the premises, and the placing and continuing the iron girders as aforesaid, a certain horse of the plaintiff *of great value, which had been brought to the station by him for the purpose of being conveyed [*174 by the defendants upon the railway from Worcester to London, for reward, was driven and struck upon and against the iron girders, and the legs of the horse were thereby greatly cut and injured, and the horse was thereby rendered of no value to the plaintiff, and was obliged to be, and was, after divers unsuccessful attempts to cure it, killed, and the plaintiff by means of the premises not only wholly lost and was deprived of the horse, but incurred medical and other expenses in

endeavouring to cure and in keeping the same before it was killed, and in the payment of certain forfeits which he was called on and obliged to pay by reason of the horse not being able to run certain races, which the horse was before and at the time of the injury engaged to run. Damage claimed, 1200*l*.

Plea. Not guilty, and issue thereon.

On the trial, before Cockburn, C. J., at the Middlesex Sittings after Trinity Term, 1863, it appeared that on the 12th July, 1862, the plaintiff was owner of a race horse called "Shillelagh." The defendants are the owners of the West Midland Railway, and of a station and station yard upon and adjoining the railway at Worcester, used and kept open to the public by them for the reception of horses and other goods and chattels sent to them for conveyance from Worcester to London, for reward. At the station there was a siding for horse-boxes opposite to the entrance of the station, and horses, in order to get to those horse-boxes, were obliged to traverse the station yard belonging *175] to the Company. In the yard, on the day in question, there *were a number of sharp iron girders lying between the entrance of the station and the siding for horse-boxes, and the only mode of access to the siding was to pass along a space or passage between such girders, the narrowest part of which was seven feet. These girders are used in the construction of railway bridges; they are thirty-five feet long, two feet deep, one foot wide, and the edges of them are sharp. The previous day there had been a race meeting at Worcester, and the plaintiff's horse ran there. On the 10th July a servant of the plaintiff gave notice to the defendants that he should want a horse-box for the purpose of carrying the horse to London on the 12th July. On the morning of the day on which the injury complained of took place, the horse was sent by the plaintiff and taken in charge of his servant to the station to be forwarded by the defendants on their railway from Worcester to London. The horse arrived at the station at 9.15 A. M. to leave by the 9.40 A. M. train. There were at the station and in the station yard other race horses, belonging to different owners, to be forwarded to London and elsewhere by the same train. These horses were being ridden in the station yard by their respective grooms, and the plaintiff's horse was being ridden by the above mentioned servant. The horse-boxes intended to convey the horses were at the siding for horse-boxes. When the horse-boxes were ready the railway porters directed the grooms to take the London horses along the space or passage through the girders; one of those porters calling out "Make haste, London horses, this way;" whereupon one of the horses for London called "Viscount Brignell," which was to be loaded first, ridden *176] by a groom of the owner, went up the space or passage *first, and the plaintiff's horse, whose turn for loading came second, followed next along the space or passage four or five yards off. The plaintiff's horse had gone through the girders part of the way, and was standing in the space or passage just beyond the place where it was most narrow, while the other horse was being loaded. This horse, in being loaded, kicked or lashed out and caused a sudden noise, whereby the plaintiff's horse, being frightened, stepped back suddenly against one of the iron girders which projected, and so sustained the injury from its sharp edge which resulted in the destruction of the horse being

necessary. The horse-boxes and the placing of the horses into them were entirely under the control of the defendants' servants. At the time of the accident the horse "Shillelagh" was being ridden by the plaintiff's groom, and, except as herein stated, had not been given into the hands of any of the defendants' servants. The plaintiff's groom had not taken any ticket nor made any declaration of value under the 17 & 18 Vict. c. 31, s. 7, nor paid any money for the conveyance of the horse. The custom was, for the ticket to be obtained after the horse had been placed in the horse-box.

On this evidence the jury returned a verdict for the plaintiff, damages 1000*l.*, leave being reserved to the defendants to move to reduce the damages to 50*l.*, on the ground that the plaintiff's right to recover was limited to that sum by stat. 17 & 18 Vict. c. 31.

In Michaelmas Term, 1863,

Hawkins obtained a rule nisi accordingly.

This rule was argued in Hilary Term, January 13th, and Easter Term, April 16th.

The case depended on the construction of two sections *of The Railway and Canal Traffic Act, stat. 17 & 18 Vict. c. 31, [*177 for the better regulation of the traffic on railways and canals, which, after reciting that it was "expedient to make better provision for regulating the traffic on railways and canals," enacts as follows:

Sect. 2. "Every railway Company, canal Company, and railway and canal Company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such Companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such Company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or Company, or any particular description of traffic, in any respect whatsoever, nor shall any such Company subject any particular person or Company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway Company and canal Company and railway and canal Company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so [*178 *that all reasonable accommodation may, by means of the rail- ways and canals of the several Companies, be at all times afforded to the public in that behalf."

Sect. 7. "Every such Company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such Company or its servants, notwithstanding any notice, condition, or declaration made

and given by such Company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said Companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned; (that is to say) for any horse, 50*l.*; for any neat cattle, per head, 15*l.*; for any sheep or pigs, per head, 2*l.*; unless the person sending or delivering the same to such Company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such Company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable per centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and *179] which shall be paid in addition to the *ordinary rate of charge; and such per-centage or increased rate of charge shall be notified in the manner prescribed in the stat. 11 G. 4 & 1 W. 4, c. 68, and shall be binding upon such Company in the manner therein mentioned; Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract between such Company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such Company under the said Act of the 11 G. 4 & 1 W. 4, c. 68, with respect to articles of the descriptions mentioned in the said Act."

Petersdorff, Serjt. and *C. W. Wood*, showed cause.—The defendants are not sued as carriers, but for injury to a horse which they were about to carry for profit, caused by their negligence in a place under their control through which the horse was compelled to pass on the occasion. A contract with a railway Company on depositing goods in their cloak room is different from a contract with them to carry: *Van Toll v. The South Eastern Railway Company*, 12 C. B. N. S. 75 (E. C. L. R. vol. 104). A shopkeeper by keeping his shop open impliedly invites every person *180] to enter it, and if a person who does so meets with *injury there in consequence of the neglect of the shopkeeper, he is liable. A person who, with permission of the owner of a private road places building materials upon it is liable for injury caused by his having done so without due caution: *Corby v. Hill*, 4 C. B. N. S. 556 (E. C. L. R. vol. 95). Here was no contract between the plaintiff and the defendants for carriage, for before the horse was put into the horse-box the groom might have changed his mind respecting the fitness of sending it by the defendants' railway, or the accident might have occurred after he received an intimation from the defendants of their refusal to receive the

horse. Nor was there a delivery of the horse to the defendants to satisfy the Statute of Frauds. [BLACKBURN and MELLOR, JJ., intimated that the Statute of Frauds threw no light on the present question.]

Hawkins and *H. James*, in support of the rule.—In order to entitle a Company to the protection of this proviso it is not requisite that any binding contract should have been entered into between them and the sender of the animal. A complete reception of it by them is not necessary; nor such a reception as would satisfy the Statute of Frauds. Reception in its popular sense, or a commencement of delivery, is enough. At the time of this accident the defendants had admitted the horse into a yard which was their property. *Corby v. Hill*, 4 C. B. N. S. 556 (E. C. L. R. vol. 95), is inapplicable; for that was not a question of limit to an admitted responsibility.

Cur. adv. vult.

And now, the Court differing in opinion, the following judgments were delivered.

*MELLOR, J. (after stating the facts).—There is no case bearing upon the subject, and we are now for the first time to determine what is the true construction of this statute, 17 & 18 Vict. c. 31, with reference to the facts of the case. The statute recites that it is expedient to make better provision for regulating “the traffic” on railways and canals; and its principal objects are: first, to compel railway and canal Companies to give equal facilities to traffic brought to them to be carried; secondly, to impose a limitation upon the power of such Companies to protect themselves from liability for injury resulting from the negligence of their servants; and thirdly, to give a modified protection to such Companies from “loss of or for any injury done to any horses, &c., in the receiving, forwarding, or delivering thereof.” The statute accordingly contains a proviso regulating the conditions which may be imposed by such Companies, “with respect to the receiving, forwarding and delivering of any of the said animals, &c.,” which is immediately followed by a second proviso, “that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned; (that is to say),” *inter alia*, for “any horse, 50*l.* . . . unless the person sending or delivering the same to such Company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned;” in which case the Company, as compensation for the increased risk and care thereby occasioned, may demand a reasonable per centage upon the excess of value so declared, above the respective sums so limited. It appears to me that this clause not only applies to the risks of carriage and conveyance, but also to those which attend the receiving [*181 and delivery by the Company of any horse, &c., required to [*182 be conveyed, and that the intention of the Legislature was to make the protection to the Company in the conduct of its traffic coextensive with the risk incurred, and that the time of such delivery does not mean the time when the contract to carry is complete, but must be read in connection with the words twice previously used in the section, *viz.*, “in the receiving, forwarding, and delivering” thereof. The horse was sent to the defendants’ premises for the sole purpose of being received, forwarded, and delivered, and I think that the accident occurred in the course of delivering and the receiving by the defendants of the horse

to be forwarded and delivered. The statute requires from the sender if he desires to recover more than 50*l.* in respect of any horse, &c., sent by him to be carried, that he shall at the time of the delivery *have already declared* the animal to be of greater value than 50*l.* It cannot, I think, be fairly contended that the limitation of the liability of the defendants only commences with the taking of the ticket, for if so the act of receiving the horse would be complete by placing it in the box, before the limitation would attach. It appears to me that the more reasonable construction is, that so soon as the horse enters the defendants' premises, for the purpose of being received, forwarded, and delivered, the act of delivering begins, and that if the persons sending a horse to be carried on the railway, desires to be in a position to recover against the Company greater damages than the amount limited by the statute, he must *have made* the requisite declaration of value before the horse was taken to the premises of the defendants. This may give *183] rise to some inconvenience, but I cannot construe the words "time of such delivery" otherwise without holding that the Legislature deemed it expedient to limit the liability of the Company during the existence of the contract to carry, but made no provision for the equally probable risk to the Company attending the acts of receiving and delivering into their care. I think that the limitation extends beyond the duration of the contract to carry, viz., to all the incidents of the particular "traffic," that is, to all the incidents attending the delivering and receiving for the purpose of being carried, and that if the party delivering the horse, &c., to be carried, desires to recover a value beyond 50*l.*, he must declare such value before the act of delivery begins. The plaintiff in the present case not having made any such declaration can only, as it appears to me, be entitled to the value limited by the statute, and therefore the rule must be absolute to reduce the damages to 50*l.*

BLACKBURN, J.—In this case I agree with my brother Mellor in thinking that the defendants are entitled to have the rule made absolute to reduce the damages to 50*l.*

The question depends entirely upon the proper construction of the 7th sect. of the 17 & 18 Vict. c. 31, and it is a new question and one of considerable difficulty. Before that Act railway Companies had the same power to restrict their liability, by notices or otherwise, that was possessed by other carriers by land. The Legislature thought fit to restrict this power of self-protection, and to enact that railway Companies "shall be liable for the loss of or for any injury done to" (inter alia) "horses," "in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such Company or its *184] servants, notwithstanding any notice, condition, or declaration made and given by such Company contrary thereto, or in anywise limiting such liability." On this enactment there is a proviso "that no greater damages shall be recovered for the loss of or for any injury done to" a horse beyond 50*l.*, "unless the person sending or delivering the same to such Company shall, at the time of such delivery," have declared it to be of higher value, in which case the Company may, "by way of compensation for the increased risk and care thereby occasioned," charge a reasonable per centage on the excess of value; which per centage is to be notified as in The Carriers Act, 11 G. 4 & 1 W. 4, c. 68.

I think that the true construction of this section is to hold the proviso coextensive with the previous enactment, or, in other words, I think that, so far as the enactment has deprived the Companies of the power to limit for themselves by their own acts their liability for a loss or injury, the proviso limits it for them, and no farther. And so construing the section, the question in this case comes, in my opinion, to be whether the enactment does apply to an injury to a horse brought on the Company's premises for the purpose of being delivered to the Company as carriers, but still in the custody of the owner's servants; that injury being occasioned by the neglect of the Company to take reasonable care that the premises which they kept open for the use of their intended customers were in such a state that their customers might use them without danger. We have already decided, in conformity with *Parnaby v. The Lancaster Canal Company*, 11 A. & E. 223 (E. C. L. R. vol. 39), (a) that the law casts a duty on them to take such reasonable care, and that the plaintiff, *having brought his horse on the defendants' premises as an intended customer, might [*185 recover for the injury occasioned to his horse by the neglect of that duty; but, in my opinion, no such duty would have been imposed on the defendants towards any person who had brought a horse on their premises, unless he had come as their customer on their invitation. I think, therefore, that the liability of the defendants to the plaintiff in this case arose entirely from the inchoate relation of carrier and customer which existed between them. I quite agree that the relation was only inchoate, and that, the horse not having been delivered out of the custody of the owner into that of the Company, and no contract for carriage having yet been made, though one was contemplated, the Company were not yet liable to the responsibility of carriers at common law; and if I thought that the 17 & 18 Vict. c. 31, s. 7, extended only to neglects and defaults after the relation of carrier and customer was completely established, and that railway Companies are left at liberty to protect themselves, as they might at common law against any preliminary liabilities, I should also think that the proviso did not apply, and consequently that the plaintiff was entitled to recover the larger sum, but I have not been able to come to that conclusion. All the cases which have yet arisen on the construction of this Act have been cases relating to injury happening after the contract for carriage had been completely made; and in the recent case of *Peek v. The North Staffordshire Railway Company*, 10 H. L. C. 473, in the House of the Lords, the attention of the House of Lords and of the Judges was entirely directed to the effect of the statute on the liability of the Company, *after [*186 the contract had been so made. But I think the effect of the statute goes farther. A railway Company might give notice that no horses were to be brought to them for carriage except on the terms that the customer was to take upon himself all risk of injury however caused on their premises, and that no horses were to be brought on their premises except on those terms. Such a notice does not go farther than many of those which actually were adopted. Now I think that if a customer had, after it, brought a horse on the Company's premises, *Walker v. The York and North Midland Railway Company*, 2 E. & B. 750 (E. C. L. R. vol. 75), is an authority for saying that, before the

(a) Affirmed on error, 11 A. & E. 230.

statute, such a notice or declaration, if brought home to the customer, would have enured to protect the Company from liability for an injury similar to that which has occurred to the plaintiff's horse; as, according to that decision, that would have proved an agreement on the part of the customer to enter the Company's premises on those terms. But, since the statute, such a notice or declaration, even if brought home to the customers would not in my opinion produce such an effect. The second section of the Act obliges the Companies to afford reasonable facilities for *receiving*, forwarding, and delivering traffic; and the 7th section in terms applies to injury "in the *receiving*, forwarding, or delivering." Neither section is confined in words to the carriage or forwarding and delivering the goods *after* they are received, and I think the spirit and intention of the enactment, as well as the words, apply to all that is to be done as part of the *receiving*, though before the receipt is complete, as well as to what is done after it is complete.

*187] It was urged on the argument, as an objection to this construction, that the time for declaring the value had not yet arrived when the accident happened. It was said (and I have no doubt correctly) that, in practice, the value, when it is declared at all, is declared at the time the ticket is taken out. But though such is and probably will continue to be the practice, it is no part of the statute. The value is by it to be declared at the time of the delivering of the animal to the Company. This may easily be done by at one and the same time announcing to the Company that a horse box is wanted by such a train, and that the value of the horse, which is to be brought down to go by it, is declared to be so much. The declaration of value may be made later at any time during the delivery, and be operative as to all that occurs after the declaration; but it seems to me clear that, in order to cast upon the Company the increased risk during any part of the receiving, the declaration must be before that part of the receiving, so as to enable the Company to take the increased care which the statute contemplates, and for which the Company may, if they have put themselves in the position to do so, claim the increased compensation contemplated by the statute. This, however, is to be done afterwards by the Company: *Behrens v. The Great Northern Railway Company*, 6 H. & N. 366.(a) All that the customer has to do is to declare the value, which in this case he has not done.

I think, therefore, the rule must be made absolute to reduce the damages to 50*l*.

*188] COCKBURN, C. J.—This is an action brought against *the defendants for negligence in not keeping the yard of their station at Worcester in a proper condition, whereby a horse of the plaintiff, which was being conducted across the yard in order to be conveyed by the defendants' railway, was seriously injured, so that it afterwards became necessary that the animal should be killed. The fact of negligence having been established, the question for our decision is whether the defendants are entitled to have the damages, which were assessed by the jury at 1000*l*., reduced to 50*l*., by virtue of the second proviso of the 7th section of The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, no notice having been given to the Company of the value

(a) Affirmed on appeal, 7 H. & N. 950.

of the horse, or premium paid in respect of the increased risk, as required by that proviso. I am of opinion that they are not.

It appears to me clear, that to entitle a railway Company to the protection of the proviso in question, in an action for negligence, the negligence complained of must be negligence in their character of carriers. In my judgment the 7th section of the 17 & 18 Vict. c. 81, relates to railway and canal Companies in their character of carriers alone. As was pointed out by my brother Blackburn in his argument at the bar in the case of *McManus v. The Lancashire and Yorkshire Railway*, 4 H. & N. 327, 329-330, on appeal, and by myself in the recent case of *Peek v. North Staffordshire Railway*, 10 H. L. C. 473, 556-558, in the House of Lords, the enactment in question was passed by the Legislature in consequence of the practice adopted by these Companies of compelling persons having goods to be carried to enter into special contracts, by which immunity against liability for negligence was secured to the carrier. Against this practice of stipulating for *non-liability in respect of negligence, the leading enactment of the 7th section [*189 of The Railway and Canal Traffic Act, 1854, subject to the qualifications contained in the provisos appended to it, is expressly directed. It seems impossible to doubt that this enactment applies to the Companies as carriers:—it seems to me it can have no other application. The same is to be said as to the provisos, which are only so many qualifications on the leading enactment. But even if any doubt could exist as to the whole of the 7th section applying to railway and canal Companies in their character of carriers only, there can in my opinion be none as to the second proviso, on which the present case turns, being thus limited in its application. It is obvious that the intention and effect of this proviso is, while the right to stipulate for immunity in respect of negligence is taken away, to extend to these Companies in respect of horses and other animals the protection given by The Carriers Act, 11 G. 4 & 1 W. 4, c. 68. in respect to the articles to which the latter Act relates. The proviso in effect incorporates the provisions of The Carriers Act as to the conditions with which carriers must comply in order to bring themselves within the protection of the Act; and it is to my mind plain that it is as carriers only that the defendants can be entitled to the benefit of the proviso. Substantially, the effect of the proviso is the same as though it had been enacted, in terms, that in respect of these Companies the provisions of The Carriers Act should be extended to horses, &c. Can it be said that, if an injury had happened to any of the articles enumerated in The Carriers Act, while being conveyed across a carrier's premises for the purpose of being delivered to him, by reason of the unsafe *state of the premises, it would have been an answer to an action for negligence in respect of not keeping [*190 the premises in a proper condition, that the value of the article had not been declared and the premium paid? I apprehend not; and I can see no reason why a different principle should prevail in construing this proviso.

Now, in this case the action is not brought against the defendants as carriers; nor, as it appears to me, could it be; for, according to my view of the facts, the liability of the defendants as carriers had not yet commenced. The horse had not been delivered to or received by them or their servants. He was still in the custody of the plaintiff's servant,

who was waiting in the yard to deliver the horse in his turn to the defendants' porters, to be placed in the horse-box. I take it to be plain that, if independently of any statutory protection, or of any negligence on the part of the defendants, an accident had happened to the horse, for which, had the horse been delivered to the defendants, they would have been liable as carriers at common law, the liability would not, under the present circumstances, have attached; inasmuch as there had been no delivery of the horse into their possession. It is true that it was necessary that the horse should traverse the yard in order to his being delivered to the defendants' servants; but he was still in the actual possession of the plaintiff's groom, and cannot, therefore, I think, be said to have been delivered, or even to have been in the course of being delivered to the defendants. In principle there can be no difference between the case of a horse which is being led or ridden across a carrier's yard and a parcel which is being carried across it for the purpose of being delivered to the carrier to be conveyed. Yet no one would say *191] that the parcel *under such circumstances was delivered, or in the course of being delivered, to the carrier, so that any liability on his part as carrier could arise.

If then the liability of the defendants as carriers had not (as it is plain to my mind it had not) arisen, I am clearly of opinion that the case does not come within the proviso relied on by the defendants. In point of fact, as I have before pointed out, the action is not brought against the defendants as carriers at all. It is brought against them, as owners of a yard across which they invite the public to pass, for negligence in not keeping the yard in a proper condition, so that it could be passed with safety; it being now settled law that any one inviting the public to a given place for purposes of business is bound to take reasonable care that the place in question can be entered with safety. If, instead of being the owners of a railway, the defendants had carried on any other business for which it was necessary that there should be access to their premises with horses, their liability in respect of negligence in not maintaining such access in a fit condition would have been undoubted. It can make no difference that the defendants are railway carriers. Their liability arises in their character of owners of the yard, not of carriers; and the statutory protection afforded to them as carriers, and as carriers only, can consequently have no application. The plaintiff had a perfect right, if he thought fit, to send his horse to be conveyed without paying the premium for insurance above 50%. In such case he would equally be entitled to have the access to the defendants' premises in a proper and safe condition, in order to deliver the horse to their servants to be carried.

*192] Even if the foregoing reasoning were not correct, the *defendants are not in a position to claim the benefit of the proviso in the present instance, inasmuch as it does not appear that they have complied with the conditions under which the statutory protection can alone be claimed. The proviso which for this purpose incorporates the provisions of The Carriers Act, 11 G. 4 & 1 W. 4, c. 68, requires the same notice as is required by the second section of The Carriers Act, and which by the third section of that Act is made the condition of the protection. No proof is given of any such notice having been put up

as required, and the probability is that the Company trust to the terms and conditions printed on the tickets which they deliver.

On these grounds I am of opinion that our decision should be in favour of the plaintiff, and, consequently, that this rule ought to be discharged; but the majority of the Court being of a contrary opinion, the rule to reduce the damages must be made absolute.

BLACKBURN, J.—A doubt occurred to me whether a rule to reduce the damages is a rule to enter the verdict within The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 34, which gives a right of appeal “in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial;” (a) but I think it is. However, if it should be necessary to mould the rule or to give leave to appeal, we will do so.

The rule was then made absolute in the terms in which it was moved.

(a) See *Seeger v. Duthie*, 8 C. B. N. S. 45, 74-75 (E. C. L. R. vol. 98).

*WHITEHEAD and Others v. PORTER. April 29. [*193

“*Bankruptcy Act*, 1861,” 24 & 25 Vict. c. 134, s. 192.—*Composition deed*.—*Pleading*.

1. A plea of a composition deed within “The Bankruptcy Act, 1861”, 24 & 25 Vict. c. 134, made between the defendant and his creditors, relating to his debts and liabilities, and his release therefrom, is pleadable in bar to an action by a non-assenting creditor.

2. Such a plea need not set out the deed.

DECLARATION by drawers against acceptor of a bill of exchange, with counts for goods sold and delivered and on accounts stated.

Plea. That, after the accruing of the causes of action and contracting the debts in the declaration mentioned, and before action, a composition deed, within the true intent and meaning of The Bankruptcy Act, 1861, was executed by the defendant, then being a debtor within the Act, and was made and entered into between the defendant, so being such debtor, and his creditors, relating to his debts and liabilities, and his release therefrom, and had become and was as valid, effectual and binding on all the creditors of the defendant as if they had duly executed the same, and that all the conditions in the Act in that behalf mentioned had been observed, and that a majority in number, representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l.* and upwards, had, in writing, assented to or approved of the deed; and that the execution of the deed by the defendant was attested by an attorney and solicitor; and that within twenty-eight days from the day of the execution of the deed by the defendant the same was produced and left, having been first duly stamped, at *the office of the Chief Registrar in Bankruptcy, [*194 for the purpose of being registered, and that together with the deed there was delivered to the Registrar an affidavit as by the Act in that behalf required, and that the deed had been duly registered and notice thereof given, and a certificate of registration obtained according to the Act; and that all other things were done and happened which were necessary to have been done and to happen to give validity to the deed as a composition under The Bankruptcy Act, 1861; and that the plaintiffs became and were bound by the deed as if they had been parties thereto and had duly executed the same, and that the defendant was

released and discharged from the claim in the declaration by the deed and by the provisions of the Act, the provisions of the Act and of the deed having been complied with by him.

Demurrer, and joinder.

A. Staveley Hill, for the plaintiffs.—First. The deed is not pleadable in bar to this action; it can only be used as a protection from process. Sect. 192 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, only makes it binding on non-assenting creditors for the purposes mentioned in sect. 198: *Harley v. Greenwood*, per Bayley, J., 5 B. & A. 95, 101; *Walter v. Adcock*, 7 H. & N. 541; *The Ipstones Park Iron Ore Company v. Pattinson*, 2 H. & C. 829. [BLACKBURN, J.—In that last case there was no release in the deed pleaded; but Pollock, C. B., says, p. 884, that if the deed had contained a release it might have been pleaded in bar.] It was not intended by sect. 192 to give the debtor the same *195] benefit as is given under sect. 161 by an order of *discharge. [BLACKBURN, J.—Then the decision in *Clapham v. Atkinson*, 4 B. & S. 722 (E. C. L. R. vol. 116), which was expressly on this point, though not taken in that case, was erroneous.]

Secondly. The plea does not set out the contents of the deed sufficiently to show to the Court that it operates as a release: *Tabor v. Edwards*, 4 C. B. N. S. 1 (E. C. L. R. vol. 98). [BLACKBURN, J.—The second plea in that case was very different from this. COCKBURN, C. J.—If you were in any difficulty by reason of this plea you ought to have applied to a Judge at Chambers under sect. 52 of The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. We have only to ascertain how far the deed is binding on the executing creditors. MELLOR, J.—In order to get a deed registered there must be an affidavit that the conditions of the Act have been complied with; and then the object of sect. 198 is that the debtor should be protected upon production of a certificate of registration. From the deed by itself it would not necessarily appear whether it was executed by the requisite number of creditors, or by the right persons.]

Gibbons, for the defendant, was not called upon.

PER CURIAM (COCKBURN, C. J., BLACKBURN, MELLOR and SHEE, JJ.)
Judgment for the defendant.

*196]

*WELLS v. HACON. April 29.

"Bankruptcy Act, 1861," 24 & 25 Vict. c. 134, s. 192.—Composition deed.—Surety.

Declaration on the common counts. Plea. A deed made between the defendant of the first part, E. H. of the second part, and L. J. of the third part, E. H. and the several other persons whose names and seals were thereunto set, or who in writing had assented to or approved of the deed, of the fourth part, and the several persons named in the second schedule of the fifth part; which, after reciting that the defendant was possessed of or entitled to certain personal property, and was indebted to E. H. and the several other persons parties thereto of the fourth part, and to the persons parties thereto of the fifth part, in the sums mentioned and set opposite to their names in the first and second schedules respectively; and an arrangement had been made that all the creditors should take in full discharge of their respective debts a composition of 10s. in the pound by two instalments of 7s. 6d. in the pound and 2s. 6d. in the pound; and it was, at the request of E. H., agreed that the said personal estate should remain under the control and disposal of the defendant; and E. H., at the request of the defendant, and in consideration, &c., agreed to enter into the covenants thereafter contained; and it

was agreed that the deed should contain the release and other provisos thereafter appearing: Witnessed that, in consideration of the premises, the defendant and E. H. covenanted with L. J. to pay him, on registration of the deed, such sum as should be sufficient to pay to all the creditors 7s. 6d. in the pound on the amount of their respective debts, provided that as regarded the liabilities under the covenants, the separate liability of E. H. should be treated as being in priority to the joint and several liabilities of him and the defendant, and also to the separate liability of the defendant; and the defendant and E. H. covenanted with L. J. that they would, before the expiration of twelve months from the date of the deed, pay to L. J. such sum as should be sufficient to pay the remaining instalment of 2s. 6d. in the pound to all the creditors, other than E. H.; and the defendant covenanted with E. H. to pay him on the registration of the deed, and on or before the expiration of twelve months from the date, the instalments of 7s. 6d. in the pound and 2s. 6d. in the pound respectively; and it was declared that L. J. should stand possessed of the sums to be paid in respect of the instalments upon trust, after the registration of the deed, upon demand in writing by E. H. and the other persons creditors of the defendant, to pay E. H. and the other persons the instalment of 7s. 6d. in the pound; and after the expiration of twelve months after the date of the deed, upon such demand, to pay the creditors the remaining instalment of 2s. 6d. in the pound; and E. H. and the persons parties thereto of the fourth part released the defendant from all debts and demands which the parties of the second and fourth parts had against him; averring that a majority in number representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l.* and upwards, did in writing assent to and approve of the deed. Held, per Cockburn, C. J., Blackburn and Shee, JJ., that the deed was a valid deed within sect. 192 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, inasmuch as (1), it did not enable E. H. to receive a larger dividend than the other creditors. (2), Cockburn, C. J., dubitante, it did not give such an advantage to E. H. in respect of the recovery of his instalment as to make the deed void. (3), It was a release of the non-executing creditors as well as of those who executed it.

*DECLARATION for goods sold and delivered, work and labour, [*197 money paid, interest, and on accounts stated; claim 200*l.*

Second plea. That after the accruing of the plaintiff's claim, and after the 11th October, 1861, the defendant was indebted to the plaintiff and divers other persons, and thereupon a deed relating to the debts and liabilities of the defendant and his release therefrom, within the true intent and meaning of The Bankruptcy Act, 1861, was made and entered into between the defendant and his creditors, and a trustee on their behalf, which was set out as follows:—"THIS INDENTURE, made the 24th December, 1863, between Richard Dennis Hacon, of, &c." (the defendant), "of the first part, E. Hacon, of, &c., of the second part, Leverton Jessopp, of, &c., of the third part, the said E. Hacon and the several other persons whose names and seals are thereunto set, or who in writing have assented to or approved of these presents, of the fourth part, and the several persons named in the second schedule hereto of the fifth part: Whereas the said R. D. Hacon was possessed of or entitled to certain personal property, consisting of household furniture, &c., all which personal property after valuation thereof by a competent valuer amounts in value in the whole to the sum of 280*l.* 4s. 6d., and whereas the said R. D. Hacon is indebted to the said E. Hacon and the several other persons parties hereto of the fourth part in the several sums mentioned and set opposite their respective names and seals in the first schedule hereto, and also to the several persons parties hereto of the fifth part in the several sums mentioned and set opposite to their respective names in the said second schedule; and being *unable [*198 to pay the said debts in full, an arrangement has been made and entered into as follows, that is to say, that all and singular the creditors of the said R. D. Hacon should take in full discharge of their respective debts a composition on the full amount thereof of 10s. in the pound,

by two instalments of 7s. 6d. in the pound and 2s. 6d. in the pound, and as further part of such arrangement it was at the particular request of the said E. Hacon agreed that the said personal estate should be and remain under and at the entire control and disposal of the said R. D. Hacon for the benefit of himself, or any other person or persons whatsoever. And as further part of such arrangement, and towards effectuating the same, the said E. Hacon, at the request of the said R. D. Hacon, and in consideration of the said personal estate so at such request remaining as aforesaid, agreed with the said R. D. Hacon to enter into such covenants as hereinafter contained for payment of the said instalments of 7s. 6d. in the pound and 2s. 6d. in the pound at the times hereinafter mentioned; and as further part of the said arrangement it was agreed that the said R. D. Hacon should pay, in respect of the debt of the said E. Hacon, the said instalments of 7s. 6d. in the pound and 2s. 6d. in the pound at the times hereinafter mentioned. And, as further part of the arrangement, it was agreed that these presents should contain such release and other provisoes as hereinafter respectively appearing. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement in this behalf, and in consideration of the premises, the said R. D. Hacon and E. Hacon do hereby for themselves, their heirs, executors and administrators, and each of them doth *199] for himself, his heirs, executors and administrators, *covenant with the said L. Jessopp, his executors, administrators and assigns, that they the said R. D. Hacon and E. Hacon, or one of them, their or one of their executors or administrators, shall and will immediately on the registration of these presents pay unto the said L. Jessopp, his executors, administrators and assigns, such sum as shall be sufficient to pay to all and singular the creditors of the said R. D. Hacon the said instalment of 7s. 6d. in the pound on the full amount of their respective debts: Provided always and it is hereby expressly agreed and declared that as regards the liabilities under the aforesaid covenants, the separate liability of the said E. Hacon, his heirs, executors and administrators, shall be deemed to be and treated as being in priority to the joint and several liabilities of him and them, and the said R. D. Hacon, his heirs, executors and administrators, and also to the separate liability of the said R. D. Hacon, his heirs, executors and administrators. AND THIS INDENTURE ALSO WITNESSETH that, in pursuance of the said agreement in writing in this behalf, and in consideration of the premises, the said R. D. Hacon and E. Hacon do hereby for themselves and their heirs, executors and administrators, and each of them doth for himself, his heirs, executors and administrators, covenant with the said L. Jessopp, his executors, administrators and assigns, that they the said R. D. Hacon and E. Hacon, or one of them, their or one of their heirs, executors or administrators, will, on or before the expiration of twelve calendar months from the date of these presents, pay to the said L. Jessopp, his executors, administrators and assigns, such sum as shall be sufficient to pay the said remaining instalment of 2s. 6d. in the pound *200] to all and singular *the creditors (other than himself the said E. Hacon) of the said R. D. Hacon, their respective executors, administrators or assigns, on the full amount of their respective debts. AND THIS INDENTURE ALSO WITNESSETH that, in pursuance of the said agreement in this behalf, and in consideration of the premises, the said

R. D. Hacon doth hereby for himself, his heirs, executors and administrators, covenant with the said E. Hacon, his executors, administrators and assigns, that he the said R. D. Hacon will, on the registration of these presents, and on or before the expiration of twelve calendar months from the date of these presents, pay unto the said E. Hacon, his executors, administrators or assigns, in respect of his said debt, the said instalments of 7s. 6d. in the pound and 2s. 6d. in the pound respectively. AND THIS INDENTURE ALSO WITNESSETH, and it is hereby agreed and declared, that he the said L. Jessopp, his executors, administrators and assigns, shall stand possessed of the said sums so to be paid as aforesaid in respect of the said instalments, upon trust at any time or times after the complete registration of these presents, upon demand for that purpose in writing made to him or them by the said E. Hacon and the several other persons, creditors of the said R. D. Hacon respectively, their respective executors, administrators or assigns, to pay the said E. Hacon and the other persons respectively, their respective executors, administrators and assigns, the said instalment of 7s. 6d. in the pound on the amount of their respective debts; and at any time or times after the expiration of twelve calendar months after the date of these presents, upon such demand as aforesaid, to pay the said several creditors, their respective executors, administrators and assigns, the said *remaining instalment of 2s. 6d. in the pound on the amount of [*201 their respective debts. AND THIS INDENTURE ALSO WITNESSETH that, in consideration of the premises, he the said E. Hacon and the said several persons, parties hereto of the fourth part, do respectively hereby acquit, release and discharge the said R. D. Hacon, his heirs, executors and administrators, of and from all and singular the debts, sums of money, bills, bonds, notes, accounts, reckonings, costs, charges, damages, expenses, judgments, executions, suits, claims and demands whatsoever, which they the said several persons, parties thereto of the second and fourth parts respectively, or their or any of their partner or partners respectively now have or shall or may or otherwise might hereafter have, claim or demand of or against the said R. D. Hacon, his heirs, executors or administrators, or his or their lands or tenements, estates or effects, or any of them, or by reason or on account of the debts, securities, claims, and demands of them, or any of them respectively, due or owing from the said R. D. Hacon and set forth in the said schedule, and all interest and arrears of interest for or in respect of the same several debts and premises, or any of them, or for or by reason of any other thing whatsoever relating thereto: Provided always, and it is hereby agreed and declared, that these presents, or anything herein, shall not in any manner prejudice or affect the realization of any security given or payable by any other person or persons other than the said R. D. Hacon. IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written." Averments. That the name of the plaintiff and of the defendant's other creditors who did not assent to and *execute [*202 the deed respectively, and the debts then due to them respectively were stated and set forth in the second schedule to the deed annexed; and a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards did in writing assent to and approve of the deed; and

the trustee appointed by the deed executed the same; and at the time of the execution of the deed the plaintiff was a creditor of the defendant in respect of the claim therein pleaded to within the meaning of The Bankruptcy Act, 1861; and, all conditions having been performed, and all things having happened necessary in that behalf, the plaintiff became and was bound by the deed as if he had been a party thereto and had duly executed the same.

Demurrer, and joinder.

Hannen, for the plaintiff.—The deed is invalid as against a non-executing creditor. It does not aver that the property mentioned is all the personal estate of the debtor, and it places the property mentioned at his disposal. There are besides two principal objections.

First. The deed does not provide for all the creditors an equality of benefit under it. E. Hacon would receive more than the other creditors. There is a covenant by the debtor and E. Hacon to pay to the trustee a sum sufficient to pay all the creditors, which would include E. Hacon, an instalment of 7s. 6d. in the pound; and also a separate covenant by the debtor to pay E. Hacon 7s. 6d. in the pound. [BLACKBURN, J.—E. Hacon is to advance the instalment of 7s. 6d. in the pound, and he is only to receive that back.] A creditor ought not to be bound by a *203] composition deed to look to a surety of *whom he may know nothing. [COCKBURN, C. J.—Suppose there were no surety: if a majority in number representing three-fourths in value of the creditors whose debts respectively amounted to 10l. and upwards, agreed to leave the personal property of the debtor under his control, a non-executing creditor would be bound: by this deed he is placed in a better position.] But all right against the debtor is abandoned. Also there is an inequality in this, that under this covenant the other creditors can only get their instalments from the trustee after a demand in writing, whereas E. Hacon can sue the debtor at once. [BLACKBURN, J.—Is a composition deed invalid because the surety gets a consideration for his becoming surety?] Not unless the surety was also a creditor.

Secondly. The deed is not a release by those creditors who did not execute or assent to it. In *Legg v. Cheesebrough*, 5 C. B. N. S. 741 (E. C. L. R. vol. 94), which was decided upon the 224th section of The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, Willes, J., in delivering the judgment of the Court, pp. 763–4, said, “The distinction is carefully made by the language of the instrument, between such creditors as are bound by the deed and such as actually execute it. As to the former, the deed is so worded that they do no more than covenant not to sue. But, as to the latter, the bringing an action is to amount to a defeasance.” . . . “We give the language relied upon full effect, by holding that those provisions of the deed which appear by the language used to have been intended, by the debtor and the creditors who sign, to bind the dissenting creditors, shall bind them; whilst those which appear by the language used to have been intended to bind the creditors who ‘actually’ sign only, and not the dissenting creditors, shall not bind such creditors.”

*204] *Quain*, for the defendant.—First. There is no inequality of benefit to E. Hacon on the face of the deed; and if there were, being the consideration of suretyship, it would not make the deed unreasonable. The deed recites an arrangement that all the creditors

should take, in full discharge of their debts, a composition of 10s. in the pound, by two instalments of 7s. 6d. and 2s. 6d. in the pound, and the covenant of the debtor to pay E. Hacon 7s. 6d. in the pound is controlled by that recital. The debtor covenants to pay E. Hacon 7s. 6d. in the pound on the registration of the deed, in order to enable him to fulfil his engagement to place a sufficient sum at the disposal of the trustee for payment of the first instalment to the creditors. [COCKBURN, C. J.—The argument based on the right of E. Hacon to get 7s. 6d. in the pound is not tenable.] As to the alleged inequality by reason of the necessity of a demand in writing by the creditors on the trustee, E. Hacon cannot recover his instalment from the trustee sooner than the other creditors. And he cannot get the instalment of 2s. 6d. from the debtor until twelve calendar months from the date of the deed, because he has that time for paying the trustee the sum sufficient to pay the instalment of 2s. 6d. to the other creditors.

Secondly. The deed is a statutable release coming into operation as soon as the requisites of the statute are complied with. The recital of the arrangement that all the creditors "should take in full discharge of their respective debts" a composition of 10s. in the pound shows that the deed was intended to have the effect of a release. The deed makes no distinction between the creditors who are bound by it and those who actually execute it. The only object of introducing the *persons [*205 who did not execute the deed as parties of the fifth part, and setting forth their names in the second schedule, was to meet the observation of Lord Westbury, in *Ex parte Cockburn, re Smith and Laxton*, 83 L. J. Bank. 17, 22, 10 Jur. N. S. 573, 576, that there was no statement of the persons or of the debts due to the persons who had not executed in the body of the deed, and therefore there was no covenant with them to pay the composition; but it is a mistake to say that they are parties to the deed,—it may be read as if they were left out.

Hannen, in reply.—First. It was not intended by the Legislature that the majority of the creditors should speculate as to the advantage of having a surety for payment of the instalments. Further, suppose an action to recover the instalments were brought by E. Hacon against the debtor, the other creditors must wait until a demand in writing has been drawn up and made on the trustee, and in the case of a creditor residing in a remote part of the country, or becoming non compos mentis, there might be great delay, or even an impossibility, in procuring his signature to the demand.

Secondly. The language of the deed cannot be extended. The creditors of the fourth part have only released their own debts, and therefore the deed cannot be pleaded as a release by a non-executing creditor.

COCKBURN, C. J.—Two objections have been taken to the validity of this deed: first, that the effect of it is to give to E. Hacon, one of the creditors who has become surety for the payment of 10s. in the pound to the other creditors, an undue advantage as against them; and *second, that the release effected by the deed is confined to the debts of creditors who are called the parties of the fourth part, [*206 who in fact have executed the deed or in writing assented to it.

On the first objection I entertain considerable doubt. Stat. 24 & 25 Vict. c. 134, s. 192, renders every deed made between a debtor and his creditors or any of them, or a trustee on their behalf, relating to the

debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management and winding up of his estate, or any of such matters, as valid and effectual and binding on all the creditors as if they were parties to and had duly executed the same provided certain conditions are observed. In the present case one of the creditors has become surety for the payment of 10s. in the pound, a sum which the creditors probably would not otherwise have received; but he has by the deed a certain advantage secured to him in respect of the payment of the instalment on the debt owing to him from the insolvent debtor. The advantage, however, is not a large one, and considering the engagement for which he is responsible to the other creditors, the arrangement is upon the whole probably disadvantageous to him rather than advantageous. The advantage is this, he may at once claim from the debtor the instalment of 7s. 6d. in the pound; and in my mind it is not a matter free from difficulty whether, though the practical result is beneficial to the body of creditors, such an arrangement comes within the terms of the 192d section. On the other hand, such an arrangement may be eminently advantageous to the body of creditors. The estate of a debtor may be insufficient to pay the creditors a certain dividend, and an individual creditor *207] may intervene, and, *keeping the debtor on his legs, may undertake to pay that dividend to all the creditors in a manner which they may consider highly satisfactory; and such an arrangement having received the assent of a number representing three-fourths in value of the creditors whose debts respectively amount to 10l. and upwards, one outstanding obstinate creditor ought not to have it in his power to frustrate it. If we could see that the arrangement was collusive, or if the deed on the face of it gave an inordinate or unreasonable advantage to the surety, it would be void; but we must presume that this deed, being assented to by the requisite majority of creditors, is for the benefit of all concerned; and therefore I am reluctant to hold that an outstanding creditor may resist it. I am not free from doubt whether the Legislature intended to give the majority of creditors power to bind the non-executing creditors by such a deed; but my learned brothers do not share that doubt, and therefore I will not differ from them.

As to the second objection. This deed is framed on the supposition that the non-executing creditors are parties to it. From the explanation in the recitals we know that the persons named in the second schedule, who are the parties of the fifth part, are the non-executing creditors. The release of the debtor professes to be only by the executing creditors, who are parties of the fourth part; and no mention is made of a release by the creditors of the fifth part. But, there being no negative words excluding them, the effect is the same as if the executing creditors had said "We release our debts," and then, according to the decisions on The Bankruptcy Act, 1861, that release operates as a release of the *208] debts of the non-executing creditors, who are in *no sense parties to the deed, except by virtue of the statute. In *Legg v. Cheesebrough*, 5 C. B. N. S. 741 (E. C. L. R. vol. 94), the defeasance was in terms confined to those who actually executed the deed, and the Court thought that the language showed an intention to exclude those creditors who did not execute the deed. Here it is as if the executing

creditors had released on behalf of themselves and of those who are bound by the deed.

BLACKBURN, J.—As to the first question, a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards agreed to an arrangement that all the creditors should take, in full discharge of their debts, a composition of 10*s.* in the pound by two instalments of 7*s.* 6*d.* in the pound and 2*s.* 6*d.* in the pound, and that, in consideration of the creditors allowing the personal estate of the debtor to remain under his control and disposal, E. Hacon, who was himself a creditor of the defendant, would be his surety for the payment of the composition. The arrangement is carried out thus: a trustee is appointed, and the debtor and his surety covenant to pay him on registration of the deed the instalment of 7*s.* 6*d.* in the pound, and before the expiration of twelve months from the date of the deed the instalment of 2*s.* 6*d.* in the pound, which instalments the trustee is to pay to the creditors on demand in writing; and, further, it is agreed between the surety and the debtor that the surety shall be primarily liable as between them to pay the instalment of 7*s.* 6*d.* in the pound. As if that arrangement is carried out the surety pays the instalment on his own debt to *the trustee and receives it back [*209 from him, that payment is rather useless and might have been left out.

Then there is a covenant by the debtor that he will, on the registration of the deed and on or before twelve months from the date of the deed, pay to the surety the instalments of 7*s.* 6*d.* in the pound and 2*s.* 6*d.* in the pound respectively. The objection taken is, that as the surety has a covenant from the debtor to pay his instalments, and the other creditors are only to receive their instalments through a trustee on demand in writing, there is a difference between the position of E. Hacon and that of the other creditors; and, no doubt, there is a difference, because E. Hacon gets the personal security of the debtor, while the other creditors, although they have the joint personal security of the debtor and the surety, have it, not directly, but through the intervention of the trustee, and then only on making a demand in writing. I do not enter into the difference in respect of the instalment of 2*s.* 6*d.* in the pound, because it raises the same point. It is contended that this renders the whole deed void under the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 192; but such, I think, is not the effect of that section. It has been held that the meaning of the section is, that the agreement must be on behalf of all the creditors, and that no class shall be excluded from it, and that the executing creditors cannot bind the non-assenting creditors to anything which puts them in a worse position than the executing creditors. Now the arrangement in this deed amounts to no more than this, that the requisite majority of creditors bargain for a surety who promises to pay all the creditors 10*s.* in the pound, and he, being a creditor, is not quite in the same position as the other creditors; but this is almost *necessary, from the fact of his being surety [*210 and the others not being so. And, even if they do give him an advantage, I am not prepared to say that it would avoid the deed. We have decided that it is within the scope of the authority of the requisite majority of the creditors to assent to a composition deed in which there

is no absolute giving up of the whole property of the debtor.(a) That being so, I cannot see why the requisite majority of creditors may not allow the debtor to keep part of his personal estate to himself and transfer part to a surety as a consideration for the purchase of his suretyship, that being a matter "relating to the debts or liabilities of the debtor and his release therefrom" within sect. 192. In the majority of cases it might be very beneficial that the creditors should make such a bargain with a person who, either as a relative or from taking a more sanguine view of the affairs of the debtor, is willing to enter into it.

The other question is, whether the deed is so framed as to be pleadable in bar. We held in *Whitehead v. Porter*,(b) this morning, that a deed containing a release may be pleaded in bar to an action by a non-assenting creditor, and that is good law. Deeds which are trust deeds only, and do not contain any release, but simply distribute the property of the debtor in bankruptcy, are not pleadable in bar; and if this deed did not operate as a release by the non-executing creditors, it could not be pleaded in bar to this action. But sect. 192 says that every deed made between a debtor and his creditors or any of them, or a trustee on their *211] behalf, relating *to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management and winding up of his estate, or any such matters, shall be as valid and effectual and binding on all the creditors as if they were parties to and duly executed the same, provided the prescribed conditions are observed. The execution of a deed by one creditor cannot release the debt of another creditor who has not executed the deed. But the effect of sect. 192 must be, that when the requisite majority execute a release of the debtor, and it appears on the face of the deed that it was intended it should be a release by all the creditors, those who do not execute are bound as if each of them had executed it and released his own debt. Does this deed then show such an intention? All the creditors who executed or assented to the deed, and all who refused to execute it, are ascertained. From the deed it appears that the parties of the fourth part are the former; and the parties of the fifth part are the persons named in the second schedule,—it is averred in the plea that all who did not assent to and execute the deed are set forth in that schedule; and the deed recites an agreement "that all and singular the creditors of" the defendant "should take in full discharge of their respective debts a composition" of 10s. in the pound, and that the deed should contain a release. In pursuance of that agreement, the creditors of the fourth part release the debtor; so that each executing creditor releases his own separate debt, and does so in furtherance of an agreement, and with the intent that the debts of the non-assenting creditors should be released; *212] consequently that all should release; and therefore it *operates as a release of the debts of those who have not, as well as of those who have executed the deed. For these reasons this objection also fails.

SHEE, J.—For some time I felt considerable difficulty from the argument of Mr. *Hannen* that there was an inequality in this deed in favour of E. Hacon, but on further consideration I think there is no such in-

(a) See *Clapham v. Atkinson*, 4 B. & S. 722 (E. C. L. R. vol. 116); affirmed in Exch. Ch. Id. 730.

(b) See the preceding case, p. 193.

equality. For E. Hacon covenants with the trustee that he will immediately on the registration of the deed pay him a sum sufficient to pay all the creditors 7s. 6d. in the pound, and the trustee is to pay that instalment to the creditors at any time after the registration of the deed, upon demand in writing; so that if the deed is carried into effect the creditors are to receive immediately the instalment of 7s. 6d. in the pound through the trustee, and in order to enable E. Hacon to fulfil his covenant with the trustee he has the debtor's personal covenant to pay him 7s. 6d. in the pound. The effect is that the majority of the creditors are willing to take instalments of 7s. 6d. and afterwards 2s. 6d. in the pound in discharge of their debts, and to get the security of E. Hacon for the payment of the instalments, and then it makes a provision, which is reasonable, that he should be paid immediately by the debtor, in order to enable him to pay the trustee. In this arrangement I see no substantial inequality or unreasonableness.

The other difficulty is met by looking carefully at sect. 192 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. [His Lordship read it.] The words are not every deed "relating to the debts or liabilities of the debtor" generally, but every deed "relating to the *debts or lia- [*218 bilities of the debtor, and his release therefrom," that is, from all his debts to all his creditors; and consequently include those who have not as well as those who have executed the deed. The words are large enough to get over the difficulty; and therefore on that objection also our judgment must be for the defendant.

Judgment for the defendant.

BALDEN v. PELL. April 26.

Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 192.—Composition deed.—Unreasonable condition.

Declaration on the common counts. Plea. A deed dated the 14th December, 1861, made between the defendant of the first part, J. P. of the second part, and certain persons who were then creditors of the defendant, and who would then have been entitled to prove under an adjudication of bankruptcy against the defendant, founded on a petition filed on the day and year last aforesaid, of the third part; by which the debtor, besides conveying all his real estate to J. P., his heirs and assigns, assigned his personal estate and effects unto J. P., his executors, administrators and assigns, in trust for his creditors, and which contained, among others, the following clauses: (1). That J. P., his executors or administrators, might appoint an attorney, clerk, or accountant, and depute to him the powers and authorities thereby given to J. P., his executors or administrators. (2). That the creditors before becoming entitled to a dividend should, if required by J. P., his executors or administrators, deliver a statement in writing of their debt or claim, with all the particulars usual in a proof in bankruptcy, and should, if required by J. P., his executors or administrators, verify such debt or claim by his solemn declaration. (3). "That all creditors to whom bills or other negotiable instruments might have been given by the defendant for the debts due to such creditors, or any of them or any part thereof, should indemnify the defendant and his estate against all claims or demands by other persons than themselves in respect of such bills or instruments, and all losses, damages and costs by reason or in respect thereof, and should, if any such bills had been endorsed or transferred to any other persons, take the same up and retire the same before or when they should become due, and so as to prevent any claim or demand in respect thereof being made upon the defendant or his estate." (4). That J. P., his executors or administrators, might convene a meeting of the creditors by notice, stating the subject to be brought forward, and all resolutions passed by the major part in number and value of the creditors present, personally or by proxy, should be valid, and bind all the creditors. (5). That if the deed could not operate under the provisions in The Bankruptcy Act, 1861, nevertheless it should be binding on all

creditors who should execute or accede to it. (6). If it should be decided by any competent legal tribunal that the deed was not binding, J. P. was empowered to execute a further deed or deeds under the provisions of The Bankruptcy Act, 1861.

1. Held that clause (3) imposed upon creditors who had received bills or other negotiable instruments an unreasonable obligation, and therefore was not binding upon non-assenting creditors of that class; and consequently the deed was void, as not fulfilling the conditions required by sect. 192 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134.

2. *Quære*, whether the other clauses were objectionable?

3. *Quære*, whether it was objectionable that the powers of the trustee under the deed were continued to his executors and administrators?

THE declaration contained counts for work, journeys and attendances by the plaintiff and J. Atwood, deceased, as the attorneys, solicitors, and agents of the defendant, &c., and the common counts.

Second plea. That, on the 14th December last past, the defendant was indebted to divers persons in divers sums of money, and amongst others to the plaintiff and J. Atwood, and to the plaintiff in respect of the debts, claims, demands and causes of action in the declaration mentioned, and the plaintiff and J. Atwood and the said persons were then creditors of the defendant within The Bankruptcy Act, 1861, and the defendant was unable to pay the same. And thereupon, on the day and year last aforesaid, and after the 11th October, 1861, by an indenture bearing date the said 14th December, made between the defendant of the first part, one J. Percivall of the second part, and certain persons, companies and copartnership firms, who were then respectively creditors of the defendant, and who would then have been entitled to prove under an adjudication of bankruptcy against the defendant, founded on a petition filed on the day and year last aforesaid, of the third part: after reciting as therein is recited, the defendant did grant, convey and assure unto J. Percivall, his heirs and assigns, all and singular the mes-
*215] suages, lands, tenements and *hereditaments whatsoever and wheresoever of or to which the defendant, or any person or persons in trust for him, was or were then seised or entitled for any estate or interest whatsoever, and whether in possession, reversion, remainder or expectancy, with the rights, members and appurtenances thereunto belonging, and all the estate, right, title and interest of the defendant therein or thereto; to have and to hold the said hereditaments and premises thereby granted and conveyed, or intended so to be, unto and to the use of J. Percivall, his heirs and assigns, upon and for the trusts, intents and purposes thereafter declared or referred to concerning the same; and the defendant did thereby also assign and transfer unto J. Percivall, his executors, administrators and assigns, all and singular the chattels real (except as thereafter excepted), goods, chattels, personal credits, personal estate and effects whatsoever and wheresoever, of or to which the defendant, or any person or persons in trust for him, was or were possessed or entitled for any interest whatsoever, and all the right, title and interest of the defendant therein and thereto: to hold, receive and take the premises thereby assigned or intended so to be unto J. Percivall, his executors, administrators and assigns, nevertheless, upon and for the trusts and purposes thereafter declared or referred to concerning the same. And it was thereby provided that the assignment or assurance thereinbefore contained should not extend or be deemed or construed to extend to any leasehold premises held by the defendant, which he was then prohibited from assigning, or from assign-

ing without consent and such consent had not been given, or to any leasehold premises the lease or leases whereof would be forfeited or become liable to forfeiture *by assignment, nor to any property or effects of any kind conveyed, assured or assigned by a certain [*216 deed, bearing date the 16th September, 1861, and made between the defendant of the one part, and R. G. B., J. M. and T. R. of the other part: it being the intent and meaning of the said presents that all such premises, property and effects should be excepted out of these presents. And the defendant did thereby appoint J. Percivall, his executors and administrators, his true and lawful attorney and attorneys for him and in his name, or in the name of the said trustee, to ask, demand, sue for, recover and receive of and from the person or persons liable or interested to pay the same, all and singular the debts, effects, moneys and premises thereby assigned or intended so to be, and on payment, receipt or delivery thereof, or any part thereof, to make, give, sign and execute all and every acquittances, receipts, releases or discharges for the same; and on non-payment or non-delivery thereof, or of any part thereof, in the name of J. Percivall or of the defendant to bring, commence and prosecute any suit, action or other proceeding which he or they might consider expedient for enforcing the payment and delivery thereof or any part thereof, and generally to do and perform all such acts, matters and things as might be necessary or expedient touching the premises. And it was thereby agreed and declared that J. Percivall, his heirs, executors, administrators and assigns, should stand seised or possessed of all and singular the premises thereby conveyed and assigned respectively, upon trust to sell, dispose of, collect, get in and receive the same with as full powers in all respects as if the defendant were a bankrupt, and the said J. Percivall had been *appointed and was [*217 acting as sole assignee of his estate and effects, and to stand possessed of the proceeds of the said trust estate, after deducting and retaining the costs, charges and expenses of and incident to the execution of the trusts of the said presents, in trust to divide the same from time to time between and amongst the present creditors of the defendant, rateably and in proportion to the amount of their respective debts, and in accordance, as far as might be, with the rules and practice in cases of bankruptcy, and after full payment thereof in trust to pay the surplus (if any) to the defendant. And it was thereby further provided, agreed and declared that for effectuating the purposes aforesaid, or any of them, J. Percivall, his executors or administrators, might nominate and appoint one or more attorney or attorneys, clerk or clerks, accountant or accountants, or other person or persons, at such salary or salaries as he or they should think proper, and depute to him or them all or any of the powers or authorities thereby given to J. Percivall, his executors or administrators, and might at pleasure revoke or vary such appointment, and might also do, order, direct and assent to all and every or any such other acts, matters and things whatsoever, relative to the premises as he or they in his or their discretion should think expedient, and in particular (but without limiting the force or effect of the general powers thereinbefore contained) that it should be lawful for J. Percivall, his executors or administrators, to exercise his or their discretion as to authorizing or commencing, defending, continuing or prosecuting, or discontinuing or compromising, any actions, suits or other legal proceedings,

and also to compound any debt or debts or sum or sums of money *218] *for the time being owing to the defendant, and to except or take security for part of the same in full thereof, and to give further time for payment of any such debt or debts or sum or sums of money, and to forego any debt or debts which should in his or their opinion be bad, and to sell or authorize sales upon credit without being answerable for any consequent loss, and also to settle and determine any question or questions, claim or claims, which should or might arise touching or concerning the construction of those presents or any clause therein contained, or touching or affecting the estate of the defendant, or relating to or arising out of or connected with those presents, by arbitration, opinion of counsel, special case, certificate of accountant, or in any other manner which J. Percivall, his executors or administrators, should think proper, and upon such terms and conditions as he or they should think reasonable, and also to abide by or contest wholly or in part any award or awards which should or might be made by the referee or referees or their umpire. And it was thereby provided and further agreed and declared, that nothing in those presents contained should release any surety or sureties, or suspend, prejudice, or affect the right or remedies of the said creditors or any of them against any surety or sureties, or any other person or persons whomsoever other than the defendant. And it was thereby provided and further agreed and declared, that it should be lawful for J. Percivall, his executors and administrators, in his or their discretion, by and out of the said estate and the proceeds thereof, to pay in full or effectuate any arrangement which he or they should deem reasonable and for the benefit of the creditors with any person or persons, either holding any *goods or *219] property, or bills or securities for the defendant (or in which he was or might be interested) by way of security or pledge for money, or having any claim or demand thereon in any manner by way of lien for the purpose of obtaining possession of the same goods, property or securities exonerated and released from such pledge or lien, claims or demands. And it was thereby provided and further agreed and declared that it should be lawful for J. Percivall, his executors and administrators, to lay out and invest, or direct to be laid out and invested, in his or their name or names, any moneys not immediately required for the purpose of making a dividend or otherwise in the purchase of any of the parliamentary stocks or public funds of Great Britain, or of exchequer bills, or by way of deposit with any banking or other Company, with full power for J. Percivall, his executors and administrators, to alter, vary, or dispose of the said stocks, funds or securities as he or they might think proper. And it was thereby provided and agreed and declared that each of the said creditors before he or she, or his or her partner or partners, should become entitled to any dividend or dividends, should, if required by J. Percivall, his executors or administrators, deliver to him or them a statement in writing signed by such creditors respectively of his or her debt or claim, or the debt or claim of the firm in which he or she might be a partner, with all the particulars usual in a proof in bankruptcy, comprising every satisfaction and security for the same, or any part thereof, and should, if required by J. Percivall, his executors or administrators, verify such debt or claim by his or her solemn declaration under the Act of Parliament in that behalf (as well

with respect to the *consideration as to the amount of the same). [*220 But neither any such declaration, nor the execution by him or her of those presents, should be conclusive evidence of the validity or amount of such debt or claim; but J. Percivall, his executors or administrators, might litigate or dispute the same if he or they should think proper; and thereafter, whenever required by J. Percivall, his executors or administrators, such statement and verification should be renewed and continued with all receipts, payments, matters and things which in bankruptcy would affect the debt or claim or the dividend thereon before such respective creditor, or his or her partner or partners, should be entitled to any further dividend. And it was further agreed and declared that all creditors to whom bills or other negotiable instruments might have been given by the defendant for the debts due to such creditors, or any of them, or any part thereof, should indemnify the defendant and his estate against all claims or demands by other persons than themselves in respect of such bills or instruments, and all losses, damages and costs, by reason or in respect thereof, and should, if any such bills had been endorsed or transferred to any other persons, take the same up and retire the same before or when they should become due, and so as to prevent any claim or demand in respect thereof being made upon the defendant or his estate. And it was provided and thereby further agreed and declared that such of the said creditors as should hold any security or securities for his, her, or their debt or debts, should be entitled to receive and be paid dividends as aforesaid only upon the balance which should remain due or owing to him, her, or them respectively after realizing his, her, or their said security or securities, or *giving [*221 full credit for the full value thereof, such value in each case to be agreed upon between J. Percivall, his executors or administrators, on the one hand, and the creditors holding the security on the other hand, and, in case of dispute, to be settled by arbitration in the ordinary manner. And it was thereby provided, agreed and declared that if J. Percivall, his executors or administrators, should for any reason be desirous of submitting to the said creditors any question or questions touching or affecting the said estate and premises, or any part thereof, or of obtaining confirmation of any act or acts done or authorized by him or them, or of passing his or their accounts, then, and in any such case, and as often as the same should happen, it should be lawful for J. Percivall, his executors or administrators, to convene a meeting of the said creditors by sending through the Post Office, addressed to each creditor at his or her usual or last known place of abode or of business in England, in time, according to the ordinary course of delivery, to be delivered seven clear days at the least before the day of meeting, a notice in writing, stating the day and place of meeting, and the subject or subjects to be brought forward thereat; and that all resolutions passed and all acts done by the major part in number and value of the creditors present, personally or by proxy, at any such meeting, upon or in reference to the subject or subjects mentioned or referred to in the notice convening the same, should be valid and effectual, and bind all the said creditors and their respective executors, administrators and assigns. And it was thereby further agreed and declared that the receipts in writing of J. Percivall, his executors or administrators, for

***222]** any money paid to him or them by *virtue of the said presents, should be effectual discharges for the same, and should exonerate the person or persons paying the same from all liability to see to the application thereof. And it was provided and thereby further agreed and declared that those presents were intended to operate and take effect under the provisions in The Bankruptcy Act, 1861, contained as to trust deeds for benefit of creditors, composition and inspectorship deeds executed by a debtor, but if for any reason those presents could not so operate, nevertheless the same should be binding on all creditors who should execute or accede to the same. And the several parties thereto of the third part, in respect of their several debts, claims and demands, did, and each of them did, in consideration of the premises, by the said indenture remise, release, and for ever quit claim unto the defendant all actions, suits, bills, bonds and writings obligatory, debts, dues, duties, accounts, sums of money, extents, executions, claims and demands, whatsoever, both at law and in equity or otherwise howsoever, which they respectively, or their respective executors or administrators, partners or partner, then had, or thereafter should or might have, or otherwise could or might have, challenge, claim, or demand against the defendant, his heirs, executors or administrators, or his or their estate or effects, for or by reason or on account of the debts, claims and demands of them the said creditors respectively, due or owing from the defendant, and all interest and arrears of interest for or in respect of the same several debts, sums of money and premises, or any of them, or for or by reason of any other matter, cause, or thing whatsoever relating thereto. And that, in the event of any competent legal tribunal deter-

***223]** mining or deciding that *from any cause whatsoever the said indenture, notwithstanding that it was duly signed or assented to by creditors of the required number and value to make it obligatory and binding on all the creditors of the defendant, is not so obligatory and binding, then and in such case the defendant, and the parties thereto of the third part, did, and each of them did thereby constitute and appoint J. Percivall the attorney of them the defendant and the said parties thereto of the third part respectively, and of his, her or their executors or administrators, partner and partners, and in his, her and their names, from time to time to make and execute or assent to such further or other deed or deeds, instrument or instruments, in the nature of a trust deed for the benefit of creditors, composition or inspectorship deed, under the provisions of The Bankruptcy Act, 1861, as the counsel on behalf of J. Percivall shall advise would be obligatory and binding on all the creditors of the defendant. Averment. That the defendant did, on the day of the date of the indenture, duly execute it, and that his execution of it was attested by an attorney and solicitor, and that J. Percivall being the trustee appointed by the indenture, duly executed it, and that after the execution thereof by the defendant a majority in number representing three-fourths in value of the defendant's creditors, whose debts respectively amounted to 10*l.* and upwards, did by writing assent to and approve of the indenture, and that within twenty-eight days from the day of the execution thereof by the defendant the same was produced and left (having first been and the same was, before registration, duly stamped with and bore such ordinary and ad

valorem stamp duties as *in and by the Act were in that behalf provided) at the office of the Chief Registrar in the Act mentioned for the purpose of being registered, and was within the twenty-eight days duly registered according to the Act, and together with such indenture there was delivered to the Chief Registrar a certificate by J. Percivall, as and being such trustee, that such a majority as in this behalf aforesaid had so in writing assented and approved as aforesaid, and which certificate also stated the amount in value of the property and credits of the defendant, as and being such debtor, comprised in the indenture; and that immediately on the execution of the indenture by the defendant possession of all the property comprised therein of which the defendant could give or order possession was by him given to J. Percivall, as and being such trustee. [*224]

Replication to the second plea. That the plaintiff never executed or in any manner assented to the deed, or derived any benefit or advantage whatsoever therefrom.

Demurrer to the second plea, and joinder.

Demurrer to the second replication, and joinder.

The case was argued April 22, 26; and judgment was delivered on the latter day.

Joseph Brown (*Macnamara* with him), for the plaintiff.—A composition deed, to take effect under the 192d section of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, must not contain terms which are unreasonable, *Leigh v. Pendlebury*, 15 C. B. N. S. 815 (E. C. L. R. vol. 109); and it must place executing and non-executing creditors upon “precisely an equal footing in point of law:” *Ex parte Cockburn*, re *Smith and *Laxton*, 33 L. J. Bank. 17, 22, 10 Jur. N. S. 578, [*225 576, per Lord Westbury. [BLACKBURN, J.—Non-executing creditors must not be put in a worse position than those who execute.] In *Dell v. King*, 2 H. & C. 84, a deed containing an arrangement to pay a composition in two instalments secured by a surety was held bad by reason of a covenant not to sue the debtor unless default was made in paying the instalments, though the arrangement applied to all creditors without distinction; and Pollock, C. B., delivering the judgment of the Court, said, p. 92, “The creditor has a right to have a deed presented to him for execution, which, when executed, will put no burden on him to which he ought not to be subject.”

First. The covenant indemnifying the debtor and his estate against all outstanding bills of exchange is unreasonable. In *Woods v. Foote*, in error, 1 H. & C. 841, the deed contained a covenant that each of the creditors, each covenanting for his own acts only, would indemnify the debtor against all and every bill of exchange, promissory note, and other negotiable instrument on which he might have incurred any liability or which might have been endorsed or put into circulation by any or either of the creditors; and Wightman, J., delivering the judgment of the Court, said, p. 849, “It seems to us that a covenant by which a creditor is bound to indemnify the debtor against liabilities of an unknown and uncertain amount, whether arising from the failure of the acceptor or the endorsees, is utterly unreasonable.” In *Nicholson v. Potts*, in this Court, Trinity Term, May 29th, 1863, affirmed in the Exchequer Chamber February 2d, 1864, the creditors, parties to the indenture,

***226]** severally for *themselves and for their several heirs, executors and administrators, but not one for the other of them, covenanted with the defendant to indemnify him and his estate from all actions on account of any bills of exchange or promissory notes accepted, drawn or endorsed by the defendant to or given to the said several creditors, parties to the indenture, or any of them, by him, and to retire and pay such bills at maturity; and an attempt was made to distinguish the covenant from that in *Woods v. Foote*, in error, but this Court and the Court of Exchequer Chamber held that there was no substantial difference between them. In *Inglebach v. Nichols*, 14 C. B. N. S. 85 (E. C. L. R. vol. 108), a covenant by each of the creditors to retire and deliver up to the debtor cancelled and discharged, all bills of exchange or promissory notes given to the creditors or any or either of them for any debt due to him or them from the debtor, or for which he was liable, and to hold him harmless against all costs, charges, damages and expenses to which he might be put in consequence of or in default of the non-retirement of the same was held to render the deed void. [COCKBURN, C. J.—May not a debtor who has given bills to some of his creditors reasonably call upon them to provide for taking them up?] A creditor, who has received a bill, may not have the means of taking it up, or by doing so he might be acting unjustly towards his own creditors: consequently this clause would in the one case impose upon him an impossibility, in the other an act of injustice. Creditors who are holders of bills at the date of the deed are creditors within sect. 192 of The Bankruptcy Act, 1861. [He referred to sect. 200.] In Archbold's Bankruptcy, 11th edit., p. 124, it is said: "If a bill of exchange or promissory note be in existence at the time a fiat is sued ***227]** out against *a party to it, it is immaterial whether the person who proves upon it took it up before or after the issuing of the fiat."

Secondly. The clause requiring that each creditor, before he is entitled to a dividend, shall, if required by the trustee, verify his debt or claim, is unreasonable. It would be binding, though a creditor were lunatic or dead. In *Leigh v. Pendlebury*, 15 C. B. N. S. 815, 822-3, note (E. C. L. R. vol. 109), a clause empowering a trustee to require the amount of any debt to be verified by solemn declaration or in such other manner as to him should seem expedient, and in the event of any creditor refusing or failing so to verify his debt then he should lose all benefit, dividends and advantage to be derived from or claimed under the deed, was held unreasonable. [BLACKBURN, J.—There a forfeiture was incurred; the word "lose" means "forfeit." COCKBURN, C. J.—That clause puts every creditor at the mercy of the trustee.]

Thirdly. In case of the death of the trustee, instead of a clause for choosing and appointing a new trustee, the discretionary powers are continued to the executors, administrators or assigns. This is contrary to the principle of the bankrupt law which, by sect. 197, is imported into composition deeds, viz., that the creditors shall choose the trustee who is to have the management of the estate. [BLACKBURN, J.—Does this deed propose to do more than would be done under it by a Court of equity if the words "executors" and "administrators" were not present? That Court would require the executor or administrator to assign the estate to the trustee.]

Fourthly. The power given to the trustee to appoint an attorney and depute to him all the powers given to *himself is contrary to the maxim *Delegatus non potest delegare*. [BLACKBURN, J.—The [*228 Legislature have said that a certain majority of the creditors may bind non-assenting creditors provided they are put on an equality.]

Fifthly. The clause by which the deed is to be absolutely binding on executing or assenting creditors, though for any reason it could not take effect under The Bankruptcy Act, 1861, is unreasonable. The effect is that, though it should be held not to bind all the creditors, those who receive dividends are bound, and so one class of creditors is bound and the other loose. [BLACKBURN, J.—Is that an objection in the mouth of a non-assenting creditor? What difference does it make to him if a creditor who signs takes upon himself to incur a liability? COCKBURN, C. J.—The deed should be such that every creditor might execute it without being prejudiced by any covenant in it.]

Sixthly. The clause giving power to call a meeting of creditors, and binding all the creditors by the resolutions passed at it, is at variance with sect. 136. [BLACKBURN, J.—That section provides that, if any such resolution is in the opinion of the Court of Bankruptcy unjust or inequitable, it may be varied or set aside.] Sect. 197 puts the creditor to the necessity of appealing to the Court. [BLACKBURN, J.—So it would without this clause. The clause may be superfluous, but I do not see that it vitiates the deed.]

Beresford, contra.—A composition deed which manifests an honest intention to benefit all the creditors, and assigns all the estate of the debtor for their benefit, is entitled to the favourable consideration of the Court. And an objection by which it is attempted to invalidate it [*229 *should show that the clause objected to must work injustice. [BLACKBURN, J.—I do not assent to the position that these deeds are to be favoured.] It is not enough that the clause is unreasonable, it should be shown to produce inequality between the executing and non-executing creditors. In *Dell v. King*, 2 H. & C. 84, the deed contained a covenant different from any of the clauses in this deed; and Pollock, C. B., in delivering the judgment of the Court, said, p. 92, “The debtor has no right to make his creditor covenant; nor has he any right to subject him to a loss of his debt, if he thinks fit to contest the validity of the deed.”

First. The clause of indemnity against outstanding bills of exchange does not apply to the plaintiff, who sues not as the holder of a bill but on an *indebitatus assumpsit*. In *Legg v. Cheesebrough*, 5 C. B. N. S. 741 (E. C. L. R. vol. 94), clauses which appeared from the language used to bind only the creditors who executed the deed, were held to be limited to them; and therefore a non-executing creditor is not bound by this clause. Non constat that in the present case there were any holders of bills given by the debtor who were not executing creditors. [BLACKBURN, J.—If so the replication should have averred it.] The decisions in *Nicholson v. Potts*,^(a) and *Inglebach v. Nichols*, 14 C. B. N. 85 (E. C. L. R. vol. 108), proceeded on *Woods v. Foote*, in error, 1 H. & C. 841, where the covenant was held to be unreasonable because it rendered each creditor liable to indemnify against the bills of all creditors. In that case, Blackburn, J., said, p. 848, “Suppose any creditor has put in circula-

(a) Cited ante, p. 225.

tion bills of exchange or promissory notes upon which the debtor has incurred liability, and he is sued upon them; by the covenant at the end *230] of "the deed every creditor who executes it becomes liable to indemnify the debtor." [BLACKBURN, J.—That does not correctly represent my view of the covenant in that case; I construed it *reddendo singula singulis* as a covenant by each creditor covenanting for his own acts with reference to the bills which he had received from the debtor; and I considered that it was unreasonable that a creditor who had endorsed a bill of exchange with the debtor's name on it should be responsible for the default of others. But I do not know whether the other members of the Court took the same view, and it is difficult to say on what grounds the majority of the Court decided that case.] This clause applies only to creditors, and a person who has received a bill of exchange for his debt, and has parted with it, is not a creditor within sect. 192 of The Bankruptcy Act, 1861. The holder of the bill is the creditor; and there cannot be two creditors at the same time in respect of the same debt: *Mare v. Underhill*, 4 B. & S. 566 (E. C. L. R. vol. 116); *Mercer v. Cheese*, 4 M. & G. 804. [BLACKBURN, J.—In *Mare v. Underhill* the plaintiff was not the holder of a bill but the acceptor of a bill for the accommodation of the debtor. COCKBURN, C. J.—And the composition deed was executed in the interval between the acceptance of the bill and the taking of it up by the plaintiff.] Then the clause applies only to those creditors who are holders of bills at the date of the execution of the deed, and it is reasonable that if they afterwards pass them to other persons they should indemnify the debtor and his estate against the claims of those persons on the bills. [COCKBURN, C. J.—The words in the latter part of the clause are more extensive, and apply to creditors who have endorsed bills away before the execution of the *231] deed.] The words "so as *to prevent any claim or demand in respect thereof" mean any further claim or demand by the holder of the bill.

Secondly. The clause as to proof of debts only amounts to this, that the creditors shall, if required by the trustee, deliver reasonable particulars of their debts in the manner usual in bankruptcy: and does not subject a creditor not complying with it to loss of his debt or dividend. In *Leigh v. Pendlebury*, 15 C. B. N. S. 815, 822–23, note (E. C. L. R. vol. 109), the clause empowered the trustee to require the debts to be verified in such manner as to him should seem expedient, and any creditor refusing or failing so to verify his debt was to forfeit all benefit, dividends and advantage to be derived from the deed.(a)

Thirdly. The debtor's estate is assigned to the trustee, his executors, administrators and assigns, and when they take the estate they must take power to administer it. If they exercise their power improperly there is a remedy in the Bankruptcy Court or a Court of equity. There is nothing unreasonable in providing that the executors or administrators in whom the property vests should exercise the power of administering it until a new trustee is appointed.

Fourthly. The power of the trustee to appoint "one or more attorney or attorneys, clerk or clerks, accountant or accountants, &c., and depute to him or them all or any of the powers and authorities" thereby given to him, applies only to the appointment of subordinates. If it

(a) See a somewhat similar clause in *Strick v. De Mattos*, 3 H. & C. 22, 36–7.

gives power to appoint another trustee independently of the creditors the Court will reject it, as a power *which the trustee has no right to exercise, and therefore it is no objection to the validity [*232 of the deed. *Ex parte Spyer, re Josephs' Assignment*, 1 De G. J. & S. 318, 327-8, 330.

Fifthly. The deed provides that if it should be decided by any competent tribunal that the deed contains any objectionable clause the trustee is empowered to execute another deed without that clause in it. It does not lie in the mouth of a non-assenting creditor to object to this power, seeing that he cannot be prejudiced by a deed prepared and executed under it. [COCKBURN, C. J.—If the clauses are reasonable non-assenting creditors are bound by them.]

Sixthly. The clause empowering the trustee to convene a meeting of the creditors, giving notice of the subjects to be brought forward, and declaring the resolutions passed at it binding, follows the provisions of the Bankruptcy Act, 1861, for winding up the affairs of debtors. Under sects. 136, 186, the Court of Bankruptcy has power to correct the resolutions if they are not proper.

Joseph Brown, in reply.—First. In *Inglebach v. Nichols*, 14 C. B. N. S. 85 (E. C. L. R. 108), the declaration was not on a bill of exchange, but on the common counts. The parties to this deed of the third part are all the creditors who would at the date of the deed have been entitled to prove in bankruptcy. Whether the plaintiff was holder of a bill of exchange or not, the deed contemplates that there were creditors of the defendant who held bills of exchange given by him; and if the deed purports to bind the class of creditors who are holders of such bills and does not do so, the plaintiff, though he does not *belong to that class, may take this objection. Unless the deed [*233 binds all creditors, not excepting any class, non-assenting creditors are not bound. By sect. 194 twenty-eight days after the execution of the deed by the debtor are allowed for getting the deed signed by the creditors and registered; but as a creditor has no notice of the deed until it is registered, during that time no creditor is bound, and any creditor might negotiate bills given to him by the debtor. This clause saddles a creditor with the costs of any intermediate action between the date of the deed and the registration of it, which is contrary to the rule that a party sued on a bill of exchange is not to bear the costs of any action except that against himself.

[The Court did not call upon him to reply on the other objections.]

COCKBURN, C. J.—As to some of the objections taken to this deed, I am not, as at present advised, prepared to say that they are fatal to its validity. I do not, however, express any definite opinion upon them, because we are all agreed that the clause rendering those creditors who have taken bills of exchange or promissory notes from the defendant liable to indemnify him in respect of them is unreasonable, and that non-executing creditors ought not to be bound by it. The clause includes two classes of creditors, viz., those who had taken bills of exchange or promissory notes and still held them, and those who had negotiated them. As to those who come under the first category, I do not say that the clause of indemnity is unreasonable; inasmuch as they have taken bills or promissory notes as security for their debts, and by the deed

*234] they get the benefit of the division of the *estate and effects of the bankrupt amongst the creditors, it is no hardship on them that they should be bound to indemnify the bankrupt's estate if they afterwards part with the bills. But as regards those creditors who have taken bills and negotiated them, this clause imposes on them the obligation either to take up the bills, or, if they do not so, to indemnify the debtor's estate against all claims, demands or actions by other persons in respect thereof. It appears to me that this is a most unreasonable condition to impose upon a non-assenting creditor. Under ordinary circumstances, if the holder of a bill given by the debtor endorses it away, he would, as endorser, be discharged from liability on the bill by want of due notice of dishonour; but under this clause, if the holder brought an action against the acceptor, the creditor would become liable to recoup the debtor's estate for the costs to which it might be put by the action. That imposes upon a non-assenting creditor a burden to which he ought not to be liable. This clause being unreasonable, the deed is void; for I cannot adopt the view of Mr. *Beresford*, that, because the plaintiff does not fall within this class of creditors, that is, because it is not shown that he has taken any bill from the debtor, therefore the deed is not void as against him by reason of this clause. It seems to me that the consideration for every creditor being bound by the deed either by coming in and executing it or by the operation of the statute which puts him in the same position as if he had executed it, is the assurance that all the creditors will come in and take the composition, and consider their debts as satisfied by the assignment of the goods and estate of the debtor; and if there is any class who are not bound by the deed *and are entitled to repudiate it, that is sufficient reason for a creditor belonging to any other class objecting to the deed and refusing to be bound by it.

Our judgment, therefore, must be for the plaintiff.

BLACKBURN, J.—I am of the same opinion. As at present advised, I agree with my Lord Chief Justice in thinking that most of the objections taken to this deed are not valid. There are one or two others on which I should not be prepared to pronounce an opinion without further consideration. But I am not prepared to hold the deed bad except on one of the objections, namely, that relating to those creditors who have received from the defendant "bills or other negotiable instruments." The 192d section of the 24 & 25 Vict. c. 134, passed "to amend the law relating to bankruptcy and insolvency in England," enacts: "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed; that is to say, 1. A majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to 10*l.* and upwards shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument: &c." On the construction of this section I take it as well settled that its enactments can

only apply to *a deed which compounds with *all* the creditors of the party. If the deed is so framed as to exclude from its operation a particular class of the creditors, then the three-fourths of the creditors who have assented to it have not pursued their statutable authority, and the deed therefore does not bind any non-assenting creditors, whether included in the excepted class or not. And I think that where the deed professedly binds all the creditors, but is so framed as to cast on a particular class of non-assenting creditors a greater burden than that which the assenting creditors take upon themselves, it is not binding on those on whom this unequal burden is attempted to be imposed; and the effect is the same as if they had been designedly excluded from the deed. The deed not being binding on all the creditors is binding on none. [*286]

Now comes the question, is there such a particular class of creditors here, *i. e.*, are those creditors who have received bills or other negotiable instruments from the debtor professedly bound to an extent beyond the power of the assenting creditors to bind them? I think they are. A creditor who has received a negotiable security on account of his debt stands in a peculiar position, which was considered in *Belshaw v. Bush*, 11 C. B. 191 (E. C. L. R. vol. 78). His right to sue for the debt is not gone, but suspended till the bill attains maturity; if then the bill is dishonoured in his hands, or if having been passed away by him it comes back upon him, he is remitted to his old debt, and may sue upon it. If the bill is satisfied he is paid, but till then he is a creditor, though his right to sue is suspended. I cannot doubt that it was intended by the 192d section to enable the three-fourths of assenting *creditors [*287] to bind such creditors as I have just described. No doubt there is great difficulty, in every case in which there are outstanding bills of exchange, in making a composition deed which shall effectually protect the debtor from being obliged to pay 20s. in the pound upon the bills to some holder who becomes so after the execution of the deed, either in virtue of a subsequent endorsement to him without notice, or as a prior endorser to whom the bill is returned. It may be that no such deed can be made unless sect. 200 be complied with, and a simple *cessio bonorum* in the form in Schedule D. be made; or unless the debtor either ascertains who are the holders of his outstanding paper, and obtains their assent, or waits until all bills to which he has put his name have attained maturity.

But, however that may be, I think the provision in this deed by which this object is sought is unequally burdensome on the creditors who have received negotiable paper on account of their debts. The more common case is that such a creditor draws on the debtor who accepts his bill, or that the debtor endorses direct to the creditor the bill of some other person, but it also often happens that some person as surety for the debtor endorses to the creditor an acceptance of the debtor. Now in this last case it would be most unreasonable to say, if you sue the surety so that he can recover from the debtor you shall not only indemnify him against the bill but pay the costs of the suit. Then in the case where the bill has been endorsed away, the acceptor may have a defence,—he may say, I have not received notice of dishonour,—and keep the bill suspended while that is being decided. The holder in the meantime will sue the acceptor, and if it afterwards appears that due notice

***238]** *of dishonour was given, he would become creditor at once, and be bound to indemnify the defendant against all costs. Or again, the person who endorses the bill away might be so situated with respect to his own creditors as to make it wrong in him to do so. If a creditor who is under such circumstances had covenanted to lay himself under such a burden it might be different; but it is neither reasonable nor right that three-fourths of a body of creditors, who perhaps have not a bill of exchange among them all, should impose it on such a creditor, and I do not think that the law authorizes them to do it. As therefore the class of creditors I have described are not bound by this deed, none of the creditors are bound.

SHEE, J.—It has now been clearly decided that a deed under the 192d section of The Bankruptcy Act, 1861, is bad if it contains clauses to which it is unreasonable to call upon a creditor to assent. In the present case the clause of indemnity does not appear so unreasonable as that in *Woods v. Foote*, in error, 1 H. & C. 841, and *Inglebach v. Nichols*, 14 C. B. N. S. 85 (E. C. L. R. vol. 108), because in those cases each of the creditors was bound to indemnify the debtor's estate, not only against bills which he had himself taken but against bills which any other creditor had taken from the debtor. In this deed each individual creditor only agrees to indemnify against all claims in respect of bills taken by himself. But still it appears to me that such a clause is unreasonable. It embraces two classes of creditors; first, those to whom the defendant has given bills for their debts, which bills they have not parted with; secondly, those who having taken bills have negotiated ***239]** *them. With respect to the first class the clause, perhaps, is not unreasonable, for they would be in the same position as if the debtor had never given bills at all on account of their debts; they could prove against his estate and would be entitled to their dividend out of it. But with respect to the second class of creditors who have put the bills received by them into circulation the case is different. The bills being outstanding the claim upon them is suspended until the bills become due, though it revives if the bills remain unpaid at maturity. Such creditors are put under a great disadvantage by this clause; for, first, they may not be able, without serious inconvenience to themselves, or injustice to others who may have claims against them, to take up the bills; and it cannot be reasonable that other creditors of the debtor should compel them to do what they either would not or ought not to have done if they were free agents. There may also be cases where a creditor, having passed away a bill given by the debtor, is not liable on it to the holder by reason of the holder not having given him notice of dishonour; and if, payment being refused by him, the holder should proceed against the principal debtor, then under this clause the original creditor would be liable for all damages and costs. This clause is therefore unreasonable, and consequently the deed containing it void as against non-assenting creditors.

I say nothing as to the other objections.

Judgment for the plaintiff.(a)

(a) See the next case.

KEYES v. ELKINS. [Nov. 18.]*[*240]**

Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 192.—Composition deed.—Release.—Reservation of rights against sureties.—Pleading.

Declaration by drawee against acceptor of a bill of exchange. Plea. A composition deed made between the defendant of the first part, a trustee of the second part, and the executing or assenting creditors on behalf of themselves and all the creditors of the defendant of the third part, by which the defendant covenanted with the trustee to appropriate half of his future net income from his profession of attorney until 5s. in the pound should be realized and paid to his creditors (the amount of such income to be ascertained and paid at certain times therein mentioned). And the creditors covenanted with the defendant to accept the deed in satisfaction of their debts, claims, and demands against the defendant, and released the defendant and his future estate from their debts, claims, and demands: provided that the release should not prejudice or prevent any of the creditors from claiming or realizing any security held by them, or from suing any person other than the debtor liable to payment thereof for the recovery thereof, less the amount received by them under the deed, nor prejudice the rights or remedies of any such creditors except as against the debtor. Held,

1. That the deed was a valid deed within sect. 192 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, inasmuch as the covenant by the defendant was not unreasonable.

2. That notwithstanding the proviso reserving remedies against sureties the deed was pleadable in bar.

DECLARATION on a bill of exchange drawn by the plaintiff and accepted by the defendant.

Plea. That after the accruing of the causes of action and contracting the debts in the declaration mentioned, and after action brought, a composition deed within the true intent and meaning of The Bankruptcy Act, 1861, was executed by the defendant, then being a debtor within the Act, and was a deed made and entered into between the defendant so being such debtor and his creditors relating to his debts and liabilities, and his release therefrom, which deed was set out as follows:—"This indenture, made the 18th March, 1864, between Edward Elkins, of, &c. (hereinafter called the debtor), of the first part; James Lane, of, &c. (hereinafter called *the trustee), of the second part; and the several persons whose names are sub-
scribed and seals affixed in the schedule hereunder written, or who shall before or after the execution hereof by the said debtor in writing assent to or approve of this deed or instrument (being respectively in their own right, either individually or in copartnership with others, or being agents or attorneys of creditors, of the said debtor), on behalf of themselves and all and every other the creditors of the said debtor (hereinafter called the creditors), of the third part: Whereas the said debtor is and standeth indebted to the parties hereto of the third part, and all those who are or are intended to be bound by these presents, in divers sums of money respectively; and whereas the said debtor being unable immediately to pay his said creditors the amount of their several debts or claims against him in full, hath lately proposed to them, and it hath been mutually agreed between the said parties hereto of the second and third parts respectively, that the said debtor should pay all and every the creditors of him the said debtor, whether executing, assenting to or approving of this deed or not, and that they the said creditors should accept from him the sum or composition of 5s. in the pound on the full amount and in full discharge of all and every the debts of the said debtor due and owing by him at the time of the execution of these presents, in manner and at the times hereinafter mentioned, that the

said debtor should make such provision for the payment of the said sum or composition of 5s. in the pound, and enter into such covenants, provisions and agreements as are hereinafter contained, and that the said creditors should execute the release hereinafter provided. Now THIS

*242] *INDENTURE WITNESSETH that, in pursuance of the said agreement and in consideration of the premises, he the said debtor doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with the said trustee on behalf of himself and the said creditors respectively, and their respective executors, administrators, partners and partner, that he the said debtor shall and will set apart and appropriate one equal half part or moiety of his future net income or profits to be derived and received by him from his professional fees and emoluments as an attorney and solicitor (and vouch the truth thereof in such a manner as shall be required by the said trustee), until the said sum or composition of 5s. in the pound shall be realized and paid in manner hereinafter provided, to and amongst all his several creditors, whether executing, assenting to or approving of these presents or not, upon the full amount and in full discharge and satisfaction of the amounts or debts due and owing by him to them, or any of them, on the day of the date hereof, and that he the said debtor will duly and truly proceed to and ascertain the amount of such net income or profits actually received (and not receivable), and declare the same to the said trustee in writing at the end of eighteen calendar months next after the date of the certificate of registration of these presents, and thenceforth in like manner ascertain and declare the receipts of the subsequent net income or profits at the end of every succeeding twelve calendar months; and further, that he the said debtor shall and will from time to time within one calendar month after such ascertainment and declaration thereof, respectively, pay over such equal half part or moiety of the said net income or profits as aforesaid to the said trustee upon the trusts

*243] hereinafter declared of and concerning the *same, that is to say, upon trust that he the said trustee, his executors, administrators and assigns, shall with all convenient speed out of the moneys which shall be received by him by virtue hereof, in the first place pay all costs, charges and expenses which shall or may have been necessarily incurred or otherwise incidentally occasioned in and about the preparation, completion and registration of these presents, such costs to be taxed on the principle as near as may be as that applied to a bankruptcy; and, in the next place, shall and do from time to time pay, distribute and divide the whole of the residue of such moneys then remaining in his hands to and amongst all the creditors of the said debtor, whether executing, assenting to or approving of this present deed or not, their respective executors and administrators, partners, partner or successors, rateably and in proportion to the several amounts of their respective debts or claims, until the whole of the said sum or composition of 5s. in the pound shall be fully paid thereon according to the true intent and meaning of these presents. AND THIS INDENTURE FURTHER WITNESSETH that, in further pursuance of the said agreement and in consideration of the premises and of the said covenant of the said debtor, they the said creditors do hereby severally for themselves, and their respective heirs, executors, administrators, partners, partner and successors, covenant and agree with the said debtor, his executors and administra-

tors, to accept and take, and they do hereby accept and take, these presents in full discharge and satisfaction of their respective debts, claims and demands against or upon him the said debtor, his estate and effects. And they the said creditors, in further pursuance of the said agreement and *for the considerations aforesaid, do, and each [*244 and every of them doth, by these presents, for themselves and their respective heirs, executors, administrators, partners, partner and successors, freely, clearly and absolutely remise, release, exonerate, discharge and for ever quit claim unto the said debtor, his heirs, executors and administrators, and his and their future lands, tenements, goods and chattels, estate and effects, all and singular their and each and every of their said respective debts, claims and demands now due and owing to them respectively, and all and all manner of action and actions, suit and suits, cause and causes of action, and suit, bills, bonds, writings obligatory, debts, sums of money, promissory and other notes, I O Us, dues, duties, accounts, reckonings, costs, charges, expenses, agreements, judgments, decrees, decretal or other orders, warrants of attorney, defeasances, extents, executions, quarrels, controversies, trespasses, damages, claims and demands, whether admitted or not, whatsoever, both at law and in equity, or otherwise howsoever, which they the said creditors and their respective heirs, executors and administrators, partners, partner and successors, now have, ever had or shall, or may or otherwise could or might hereafter have, claim, challenge, or demand of from and against him the said debtor, his heirs, executors or administrators, or his or their lands and tenements, goods and chattels, estate and effects, or any of them, for or by reason or on account of the debts, claims or demands of them, or any of them, respectively now due and owing or claimed to be due and owing from the said debtor, and all interest and arrears of interest for or in respect of the same several debts and premises, or any of them, or for *or by reason or on [*245 account of any other matter, cause or thing whatsoever relating thereto antecedent to and including the day of the date hereof; and these presents shall and may accordingly operate as a defeasance pleadable in bar to or may be otherwise set up as a defence to any action or actions, suit or suits, or other proceedings at law or in equity heretofore or hereafter brought, instituted or taken by or on behalf of the said creditors, or any of them, their or any of their heirs, executors or administrators, partners, partner or successors, for or in respect of such debts, claims and demands, or any of them. Provided always, and it is hereby agreed and declared by and between the said parties hereto, that the execution, assenting to or approval of these presents, and the acceptance of the said sum or composition of 5s. in the pound at the times, by the means and in manner hereinbefore mentioned, and the release hereinbefore contained shall not in anywise prejudice, affect, or extend, or be construed to extend, to prevent any of the said creditors from claiming or realizing any security now held by them, or any of them, or from suing any person or persons, other than the said debtor, liable to payment thereof for the recovery thereof less the amount received by them, or any of them, under and by virtue of these presents, nor in any way prejudice or affect the rights or remedies of any such creditors, except as against the said debtor, to which but for agreeing to or signing these presents they might severally have recourse for the

recovery of their several debts or demands; but, nevertheless, if any such security shall be enforceable against the said debtor or his estate or effects, then and in that case such creditor (unless he shall consent to *246] abandon his said security) shall be *entitled to receive payment of his secured debts under these presents upon so much only of his said secured debt or debts as may remain after such security shall have been realized, or after credit shall have been given for the full value thereof, such value to be ascertained as in bankruptcy. And, moreover, it is hereby lastly agreed and declared by and between the said parties that these presents are intended to operate, and shall (so far as lawfully may be) operate to all intents and purposes whatsoever as a deed of composition within the provisions of the 192d section of The Bankruptcy Act, 1861, in that behalf, and that, so soon as a majority in number representing three-fourths in value of the creditors of the said debtor whose debts shall respectively amount to 10*l*. and upwards shall have executed or in writing assented to or approved of this deed, it is intended that the same shall be registered in the Court of Bankruptcy under the provisions of the said Act, and the general orders made thereunder in that behalf, in order that the said debtor may obtain the protection of the said Court granted under the said Act, for the purpose of being available to him for all purposes as a protection in bankruptcy, and that all the creditors of the said debtor who would be bound by this deed in case it were a deed of composition or trust deed for the benefit of creditors within the true intent and meaning of the 192d section of The Bankruptcy Act, 1861, and in case all the conditions mentioned in the said Act in that behalf had been observed, shall be equally bound by and entitled to the benefit of this deed, and that any provision herein to the contrary shall be void and of none effect. IN WITNESS, &c." Averment. That the deed had become and *247] was as valid, effectual and binding on *all the creditors of the defendant as if they had duly executed the same, and that all the conditions in the Act in that behalf mentioned had been observed; [then followed other usual averments of performance of the conditions prescribed by the Act]; and that the plaintiff became and was bound by the deed, with respect to the debt sued for as if he had been a party thereto and had duly executed the same; and that the defendant was released and discharged from the claim in the declaration by the deed, and by the provisions of the Act and of the deed having been complied with by him.

Demurrer, and joinder.

Replication. That at the time of making the indenture divers of the creditors held securities for debts then due from the defendant; and that persons other than the defendant were liable to payment of some of those securities; and that divers persons other than the defendant were liable as joint debtors with and sureties for the defendant for divers of the debts then due from him.

Demurrer, and joinder.

The case was argued, November 15, 18, and judgment was given on the latter day.

Cleasby, for the plaintiff.—First. The deed is unreasonable, and therefore not binding on a non-assenting creditor. It has been decided that there need not be a *cessio bonorum* of the debtor; but here the

debtor does not covenant to pay a certain sum by way of composition: the covenant is no more than to set apart a portion of a future fund which may never exist. If the debtor should die, having acquired property within the first eighteen months, or should be struck off the rolls within *that time, the deed would have the effect of preventing the creditors from deriving any benefit. [CROMPTON, J. [*248—The deed amounts to an accord and satisfaction in consideration of the debtor agreeing to carry on his profession and keep the accounts of his professional income, and pay one half to a trustee for the benefit of his creditors, until the composition of 5s. in the pound is paid.] How could it be shown that he had exercised diligence in his profession? That depends on his own option, and the creditors have no power of controlling it. [COCKBURN, C. J.—Suppose the debtor had no assets; it might be the only chance of his creditors getting any portion of their debts that he should be released from them and continue his profession.] The deed does not recite that he had no assets. [CROMPTON, J.—Suppose a debtor has a vested remainder, and a deed of arrangement contains an agreement by him to pay a composition to his creditors when the remainder takes effect, would it not be reasonable? MELLOR, J.—Suppose an actor or singer who has nothing but the prospect of realizing something by the exercise of his talents, enters into a deed such as this with his creditors. Here no creditor is excluded. COCKBURN, C. J.—The Legislature have not empowered the majority of the creditors to impose unreasonable conditions on the non-assenting creditors. But we are not satisfied that this deed is unreasonable.]

Secondly. The deed does not operate as a release of the debtor, but only as a covenant not to sue, and therefore is not pleadable in bar. Though it purports to release the defendant from all debts and demands against him, it afterwards contains a proviso that it shall not operate to prevent any of the creditors from claiming or realizing any security held by them, or from suing any person *other than the debtor [*249. liable for payment of such security. There is an inconsistency in these clauses which can only be reconciled by construing the release as a covenant not to sue; for a release of one joint debtor is a release of all, and if the deed were held to operate as a release no effect would be given to the proviso: *Price v. Barker*, 4 E. & B. 760. [MELLOR, J.—This is a release under statute, and sect. 192 of The Bankruptcy Act, 1861, speaks of a deed relating to the debts and liabilities of the debtor “and his release therefrom.”] Even if it is a release it is not pleadable in bar to an action by a non-assenting creditor. In *Ipstones Park Iron Ore Company v. Pattinson*, 2 H. & C. 828, the Court of Exchequer held that in the absence of express words of release a deed under sect. 192 does not operate as a release, and that the remedy for the debtor was either by application to the Court of Bankruptcy under sect. 197 to stay the proceedings, or after judgment to a Court of law to stay execution under sect. 198. In *Eyre v. Archer*, 16 C. B. N. S. 638, it was held that a deed in the form given by sect. 200 and Schedule D, assented to and executed by the required number of creditors, could not be pleaded in bar to an action by an assenting creditor. [COCKBURN, C. J.—A deed in that form contains no release, it only conveys all the estate and effects of the debtor to trustees to be applied and administered for the benefit of his creditors, as if he had been adjudged bank-

rupt.] On performing the conditions in that deed he is discharged. [COCKBURN, C. J.—The whole effect of such a deed is to bring the debtor before the Court of Bankruptcy.] The deed is only a personal disqualification on the creditor who has executed it. [CROMPTON, J.—

*250] No: all the creditors are *bound to each other ex contractu.] The only ground on which a covenant not to sue is pleadable in bar to an action is to avoid circuitry of action; but that reason does not apply here, for the majority of the creditors could not make a creditor covenant not to sue so as to be liable to an action if he sued: *Dell v. King*, 2 H. & C. 84, *Hidson v. Barclay*, 3 H. & C. 9.(a) These considerations were not brought before the Court in *Clapham v. Atkinson*, 4 B. & S. 722 (E. C. L. R. vol 116).(b)

Mellish, for the defendant.—The deed is pleadable in bar to the action. If the plaintiff had executed it there would have been an absolute release by him; and by sect. 192 of the Bankruptcy Act, 1861, the deed binds the plaintiff as if it had been executed by him. The proviso which follows the release has no application to persons in the position of the plaintiff, but only applies to those creditors in respect of whose debts there is a joint debtor or surety with the defendant. The effect of the proviso is to turn the release into a covenant not to sue, and that is at all events a good equitable plea: *Clapham v. Atkinson*, 4 B. & S. 722 (E. C. L. R. vol. 116);(b) for a Court of equity would grant an unconditional and perpetual injunction against an action brought by the party bound by that covenant. There is difficulty in framing a composition deed under sect. 192 of the Bankruptcy Act, 1861, so as not to discharge sureties. It would be unjust that creditors who hold security for their debts should be obliged to release a solvent surety, as well as contrary to the principles acted upon in the Court of Bankruptcy, and *251] to the provisions of The *Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 200, according to which, by sect. 197 of stat. 24 & 25 Vict. c. 134, these deeds are to be construed. The inequality between creditors who have security for their debts and those who have not exists before the execution of the deed. The replication does not aver that there was any joint debtor or surety as regards this debt. [He was then stopped.]

COCKBURN, C. J.—We are agreed that our judgment ought to be for the defendant. We do not proceed upon the ground of overruling the decision in *The Ipstones Park Iron Ore Company v. Pattinson*, 2 H. & C. 828. It is not necessary to say whether the effect of the composition clauses in The Bankruptcy Act, 1861, in the case of a deed in which there is no release or covenant not to sue, would be to enable the debtor to plead the deed in bar to the action, or to send him to seek relief in the Court of Bankruptcy. I entertain some doubt as to the decision in *The Ipstones Park Iron Ore Company v. Pattinson*, 2 H. & C. 828, and should not regret if it were made the subject of further consideration in a Court of error. But our judgment steers clear of that case, because in this deed there is a release by the creditors which did not exist in the deed there; and for the purpose of considering Mr. *Cleasby's* argument, I treat it as a release qualified by the reservation of the rights of creditors against the co-debtors and sureties of the principal debtor. Mr.

(a) The judgment was reversed by the Exch. Chamber in Hil. Vac. 1865; see 4 B. & S. 361.

(b) Affirmed in error, 4 B. & S. 730.

Cleasby says that, according to legal principles, such a qualified release of the debtor does not operate as a release, but only as a covenant not to sue. He admits that such a release might be pleaded in bar to an action brought by any creditor who was a party to the deed, *but he denies that effect of the release as against a creditor who is only a party to the deed by virtue of sect. 192 of The Bankruptcy Act, 1861. I find however in that section a statutory enactment which amounts to this, that if the required conditions are observed the execution of the deed by some of the creditors shall be considered as an execution by all, and that one who does not choose to execute it shall be in the same position as if he had set his hand and seal to it. It follows that this deed, which it is conceded would be pleadable in bar to an action brought by a creditor who executed it, is also pleadable in bar to the action brought by a person in the position of the plaintiff. We ought to express our opinion on this point, because we entertain no doubt upon it. [*252]

But it is not necessary to decide that point, for Mr. *Mellish* is well founded in saying that there is here a release to the debtor, and not merely a covenant not to sue. It is an absolute release by all the creditors, with the exception of those who happen to have a co-debtor or surety to resort to, for to such their right to proceed against the co-debtor or surety is reserved. The plaintiff is in the position of not having any co-debtor or surety, and therefore, being bound by the deed executed by the requisite majority of creditors as if he had himself executed it, he has released the defendant from the debt.

It is said that the above reservation creates inequality between one class of creditors and another; but sect. 192 says nothing about inequality between creditors. The true construction of the section is, that the deed shall be binding if it contains no terms which are unreasonable as against creditors who do not execute it. *To make the deed unreasonable on the ground of inequality between the creditors, there must be some substantial inequality. Here is an absolute release by one class of creditors, and with regard to the other class the release operates as a covenant not to sue. But in either case it is substantially the same; inasmuch as in both the deed may be set up as a plea in bar to an action against the debtor, and the creditor is estopped from pursuing his ordinary remedy at law. [*253]

Therefore there is nothing unreasonable in this deed or which prevents it from having full effect under sect. 192.

CROMPTON, J.—I have arrived at the same conclusion. The deed does not create an inequality among the creditors; the assenting and non-assenting creditors are in the same position and bound by the same terms.

The first question is, whether the deed contains an absolute release. I was struck by one part of Mr. *Cleasby's* argument as to the apparent inconsistency in the deed if it was construed as a release. But, looking at it altogether, I think it does not operate as a release by way of destruction of the debt; for such a release would be unfair on non-assenting creditors who had joint debtors or sureties against whom their claims could be enforced. The deed is in the form in which such deeds are usually drawn,—a consideration to which sufficient weight was not given in *Tetley v. Taylor*, in error, 1 E. & B. 521, 532 (E. C. L. R. vol. 72). The present case is different from *The Ipstones Park Iron*

Ore Company v. Pattinson, 2 H. & C. 828, for in that case there was no agreement that the deed should be pleaded as a release nor covenant *254] not to sue the debtor, *but only an assignment of his estate to a trustee for the benefit of his creditors. The question here arises entirely on the clauses of the deed; and the non-assenting creditors are bound by it and by nothing else. I have some difficulty in giving the clause of release one construction as to one set of creditors and a different construction as to another; but, taking this release to be only a covenant not to sue, I think the plea is good as showing an equitable, if not a legal, defence to the action. In effect, the creditors say to their debtor, "we will take the agreement in this deed as discharging an satisfying the debts due to us from you, so far as this, that we will never bring an action against you in respect of any of those debts;" and, having so agreed, they execute a release. After such an agreement, entered into by the creditors for a good consideration, a Court of equity would restrain them from bringing an action against the debtor; and we can now administer equity partially. It is not necessary to say whether, if a creditor brought an action, an action would lie against him on the covenant not to sue; but it is absolutely necessary to hold that a deed, which contains a release of the debtor, should contain a provision reserving to the creditors their rights and remedies against sureties, and this seems to be a fair deed in that respect.

Then, what is the effect of the deed? I cannot doubt, after the decision in *Clapham v. Atkinson*, 4 B. & S. 722 (E. C. L. R. vol. 116), (a) though in that case the point was rather assumed than argued, that the creditors take the agreement for the composition in the deed as an accord and satisfaction of their claims, and that the deed operates to bar the action. In that case the creditors agreed to accept a composition, and *255] they severally undertook and agreed to execute to the debtor a good and sufficient release in the law of their several and respective claims and demands on him. The deed there did not go so far as this deed, for it did not contain a positive release, but only an agreement to execute a release, yet the plea pleading it was held to be a good equitable plea under sect. 192; although such an agreement would perhaps not be a defence at law. In the present case the creditors agree not to sue their debtor, which appears to me to be practically the same as in *Clapham v. Atkinson*, 4 B. & S. 722 (E. C. L. R. vol. 116), (a) and if we were to decide in favour of the plaintiff we should decide against the decision of the Exchequer Chamber in that case.

MELLOR, J.—The object of the 192d section of The Bankruptcy Act, 1861, is to allow the debtor and a large majority of his creditors to make such arrangement as appears most likely to be beneficial to all; but as the majority who assent to the deed are empowered by the statute to bind the others who do not assent to it, the condition has been necessarily implied that the deed by which the arrangement is carried out should be a reasonable deed. As soon, however, as such a deed has been executed by the required majority all the creditors assenting and non-assenting are equally bound by it; and if the remedies against sureties were not preserved, a majority who have only claims against the debtor without any responsible surety might inflict upon the minority, who had claims also against sureties, the greatest injustice in binding.

(a) Affirmed in error, 4 B. & S. 730.

them by the deed. If we yielded to Mr. *Cleasby's* argument it would be almost impossible to make an arrangement under sect. 192 [*256] where any creditors have sureties for their debts. Though, by reason of the rule of law that a release of one joint debtor releases the other, this may be a covenant not to sue the debtor, it is in effect a discharge of the principal debtor from his liabilities, which may be pleaded in bar to the action. A contrary decision would defeat the object of the Legislature.

SHEE, J.—We are to endeavour to give effect to the 192d section of The Bankruptcy Act, 1861. This deed purports to be, and is, a release of the debts so far as the debtor is concerned; but it has been argued that it cannot really be so, because it is of the essence of a release that if the debt due to the principal is released there can be no remedy against joint debtors and sureties, and that in this deed the remedy against sureties is kept up.

A release of the principal does not however necessarily release the surety, for in many releases a remedy against sureties is reserved; and it appears to me that this deed has the same effect as a contract which releases the principal and not the surety. It amounts to a covenant by those of the creditors upon whom sect. 192 makes it binding not to sue the debtor.

It is said that this construction produces inequality, but it is only such as a Court of equity and the Court of Bankruptcy would carry into effect; for by sect. 192 and other sections the estate is to be administered as in the Court of Bankruptcy. I therefore think the deed is a defence to the action.

Judgment for the defendant.(a)

(a) See *Garrod v. Simpson*, 3 H. & C. 395.

*The QUEEN v. INGHAM. May 4. [*257

Coroner's inquisition.—Manner and cause of death.—24 & 25 Vict. c. 100, s. 6.—Time of death.—6 & 7 Vict. c. 83, s. 2.—View.—Improper reception of evidence.—Misdirection.

1. Stat. 24 & 25 Vict. c. 100, s. 6, which enacts that "in any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused," applies to a coroner's inquisition.

2. A coroner's inquisition, which found A. B. guilty of manslaughter, omitted to state the time at which the offence was committed: Held, that the objection was cured by stat. 6 & 7 Vict. c. 83, s. 2, which enacts that no inquisition found upon any coroner's inquest shall be quashed "for omitting to state the time at which the offence was committed, when time is not the essence of the offence."

3. It is not necessary that the jurors on such an inquisition should be sworn *super visum corporis*, or that they should be sworn at the same time, or that they should all view the body at the same time.

4. It is no ground for a certiorari to bring up a coroner's inquisition that evidence not upon oath was received.

5. Or that the direction of the coroner to the jury was improper.

6. Or that there was no evidence to warrant the finding of the jury.

In Michaelmas Term, 1863, November 16th,

Temple moved for a certiorari to bring up the following inquisition taken before John Richard Ingham, deputy coroner of the county of

York, and the depositions and the recognisances by which a certain party was bound to prosecute at the then next assizes.

"County of York, } An inquisition indented taken for our Sovereign
to wit. } lady the Queen, at, &c., on, &c., before George
Dyson, one of the coroners of our said lady the Queen for the said
county of York, on view of the body of Sarah Greenwood, now here
lying dead within the jurisdiction of the said coroner, upon the oaths of
John Horsfall, foreman" [the names of fourteen other jurors were set
out], "good and lawful men of the said county of York, who, being
now here duly chosen, sworn and charged to inquire for our said lady
*258] the Queen *when, where, and in what manner the said Sarah
Greenwood came to her death, say upon their oaths that John
Arthur Ingham, late of, &c., did feloniously kill and slay the said Sarah
Greenwood, and that the said Sarah Greenwood at the time of her
death was a female person of the age of twenty-eight years, and a dyer
frame-tenter. In testimony whereof, as well the said coroner as the
said jurors have in this inquisition set their hands and seals the day,
year and place above written.

"George (L. s.) Dyson, Coroner, by John Richard Ingram, his deputy,
duly appointed. John (L. s.) Horsfall."

[Then followed the names and seals of the fourteen other jurors.]

It appeared from the affidavits that on the 4th November, 1863, the
day after the deceased had been killed by the explosion of a steam-
boiler at a mill belonging to a firm of which the defendant was a mem-
ber, fourteen of the fifteen jurymen summoned having assembled in the
room of an inn before going to view the body, they elected Horsfall as
their foreman; the deputy coroner then administered the oath to them,
and after that he and the jurymen so sworn proceeded to view the body
of the deceased, which was lying in a cottage about seventy yards from
the inn. After the view of the body the coroner and jury returned to
the inn. The fifteenth person summoned on the jury then arrived, and
stated that he had viewed the body on his way. The coroner said that
would not be legal, and he must first be sworn and then go to view the
body. The coroner then administered the oath to him, and directed a
police officer to take him to view the body: he went, and returned in a
short time, the coroner remaining with the other jurymen in the inn.
*259] The first witness *was being examined when the fifteenth jury-
man arrived, and her examination was continued during his
second absence and was nearly completed when he returned: but after
it was concluded the whole of her deposition was read over to her, and
she made her mark thereto in the presence of all the jury. It also ap-
peared from the depositions that evidence was taken not upon oath.

Temple.—First. The inquisition does not state the manner in which
or the means by which the death of the deceased was caused. Stat. 24
& 25 Vict. c. 100, s. 6, which enacts that it shall not be necessary to
do so "in any indictment for murder or manslaughter," does not apply
to an inquisition before a coroner. In stat. 14 & 15 Vict. c. 100, which
contained a similar enactment, sect. 4, there was an interpretation clause,
sect. 30, by which in the construction of that Act, the word "indict-
ment" included "inquisition."

Secondly. The inquisition does not state the time when the wound
by which the death was caused was inflicted: Reg. v. Brownlow, 11 A.

& E. 119 (E. C. L. R. vol. 39). Stat. 6 & 7 Vict. c. 83, s. 2, enacts that no inquisition found upon any coroner's inquest shall be quashed "for omitting to state the time at which the offence was committed, when time is not the essence of the offence;" but the time when the wound was inflicted is of the essence of the offence, because the death must ensue within year and a day from the stroke or other cause of death. [WIGHTMAN, J.—On the trial it would not be necessary to prove the day alleged. If manslaughter were defined to be a felonious killing, provided the death occur within a year and day after the wound, the time of the wound ought to be alleged *in an indictment; but, that not being so, time is not of the essence of the offence, and therefore [*260 stat. 6 & 7 Vict. c. 83, s. 2, renders it unnecessary to state it in a coroner's inquisition.]

Thirdly. One of the jurymen had not a view of the body in the presence of the coroner, nor until after the inquest had proceeded some time; and the jury were not sworn *super visum corporis*: *Rex v. Ferrand*, 3 B. & A. 260 (E. C. L. R. vol. 5). Stat. 6 & 7 Vict. c. 83, s. 2, which enacts that no inquisition shall be quashed "because the coroner and jury did not all view the body at one and the same instant, provided they all viewed the body at the first sitting of the inquest," does not cure either of these objections.

Fourthly. Evidence not upon oath was received. [He cited *Jervis on Coroners*, p. 237.] [COCKBURN, C. J.—Has this Court ever taken upon itself to quash a coroner's inquisition for improper reception of evidence? He receives the evidence in the exercise of his judicial functions.(a)] In *Archb. Crim. Pl. and Evidence*, by Welsby, p. 107, 15th ed., it is said, "In a recent case, it was laid down by Pollock, C. B., that if a coroner permit any person to make a statement before him at an inquest, it must be upon oath, and if it turn out to be irrelevant, then he should reject it, as he has no right to receive any statement which is not made on oath; and this ruling was afterwards upheld by the Court of Exchequer. *Wakley v. Cooke*, 4 Exch. 511." [COCKBURN, C. J.—That was an action of libel, and Parke, B., p. 516, said, that the practice of coroners not to examine persons who might by their evidence criminate themselves *was not correct; not that a fresh [*261 inquisition would be directed if they did.]

Fifthly. The direction of the coroner to the jury was improper, and there was no evidence to warrant their finding. [COCKBURN, C. J.—Is there any authority for granting a *certiorari* where the coroner has laid down the law to the jury improperly? And if the verdict were against the evidence, we could not set it aside.] Where there is no evidence to warrant a conviction by justices this Court will quash it. [MELLOR, J.—The coroner's inquisition is not final.]

The COURT granted a rule nisi on the first, second and third grounds, but refused it on the fourth and fifth. Rule nisi accordingly.

This rule was made absolute on the last day of the same Term before Crompton, J., in the Bail Court.

In Hilary Term, 1864, January 13th, *Temple* obtained a rule calling upon George Dyson, one of the coroners of the county of York, John Richard Ingham, the deputy coroner, and the prosecutor (the next of

(a) See *Jervis on Coroners*, 2d ed. by Welsby, p. 318.

kin of Sarah Greenwood, deceased), to show cause why the inquisition and the several recognisances taken thereon should not be quashed.

The affidavits used on showing cause stated that the absent jurymen joined the deputy coroner and the rest of the jurymen when they were viewing the body, and viewed the body with them; that the jury then returned to the inn, and that immediately thereupon the whole fifteen jurymen being present the deputy coroner swore the fifteenth jurymen, and sent him, accompanied by a police serjeant, to view the body, and that no evidence was taken until his return.

*262] *The rule was argued April 27th and May 4th, and judgment was delivered on the latter day.

Cleasby (*Welsby* with him) showed cause.—First. Stat. 14 & 15 Vict. c. 100, “for further improving the administration of criminal justice,” by sect. 4 enacted, that “in any indictment for murder or manslaughter preferred after the coming of this Act into operation it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused,” and gave a succinct form of indictment. And by the interpretation clause, sect. 30, the word “indictment” was to be understood as including “information,” “inquisition,” and “presentment.” Sect. 4 of that statute was repealed by stat. 24 & 25 Vict. c. 95, but re-enacted in stat. 24 & 25 Vict. c. 100, s. 6, which enacts that “in any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused,” &c. The interpretation clause in stat. 14 & 15 Vict. c. 100, is not re-enacted, nor is it needed, because stat. 24 & 25 Vict. c. 100, which was passed to consolidate and amend the statute law relating to offences against the person, applies to the administration of the criminal law generally, and therefore as much to coroners’ inquisitions as to indictments found by a grand jury. [He referred to sects. 5, 9.] [BLACKBURN, J.—The learned gentleman who drew the Act gives as the reason for this amended enactment that “a serious doubt was entertained whether in an indictment against an accessory to murder or manslaughter, it might not still be necessary to adopt *263] the old form of *indictment.”(a) This may account for indictments only being mentioned, but cannot affect our decision of the question.] A finding, whether by the grand jury, also called the grand inquest, or by the coroner’s inquest, which finds a man guilty, is an indictment. Stat. 11 H. 4, c. 9, intituled “jurors in indictments shall be returned by the sheriff, or bailiffs, without the denomination of any,” enacts (3) “that from henceforth no indictment be made by any such persons, but by inquests of the king’s lawful liege people,” &c. And in *Sir William Withipole’s Case*, Cro. Car. 134, referred to in 2 Hale P. C. 60, 155, it was held by the majority of the twelve Judges that that statute extended as well to inquests before coroners as to indictments before justices of the peace. And in the report the coroner’s inquisition is called an indictment. [He also cited *Anon.*, Poph. 209.] In stat. 2 & 3 Edw. 6, c. 24, s. 2, where any person shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another, “an indictment thereof founden by

(a) The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict., by Greaves, p. 39, 2d ed.

jurors of the county where the death shall happen, whether it shall be founden before the coroner upon the sight of such dead body, or before the justices of peace, &c., shall be good and effectual in the law." By stat. 1 & 2 P. & M. c. 13, s. 5, "every coroner, upon any inquisition before him found, whereby any person or persons shall be indicted for murder or manslaughter," shall put in writing the effect of the evidence given to the jury before him, being material. [He also cited stats. 7 G. 4, c. 64, ss. 4, 20, and 6 & 7 Vict. c. 83, s. 2.] In text writers the word "indictment" is used as applicable to a coroner's *inquisition. In 2 Inst. 32 it is said, "And what authority had the [*264 coroner? the same authority he now hath, in case when any man come to violent, or untimely death, super visum corporis, &c.; abjurations, and outlawries, &c., appeales of death by bill, &c. This authority of the coroner, viz., the coroner solely to take an indictment, super visum corporis; and to take an appeale, and to enter the appeale, and the count remaineth to this day." In 2 Inst. 387, on stat. Westm. 2d, 13 Edw. 1, c. 13, the terms "presentment" and "indictment" are used as synonymous; though the instrument on which a person can be put on his trial is properly called an indictment. In 3 Inst. 184, chap. 62, "Of indictments" it is said, "And in that case one man was coroner both of the King's house and of the county, and the indictment of manslaughter was taken before him as coroner both of the King's house and of the county. And it was adjudged that the indictment was good." In 2 Hale P. C., chap. 19, proceedings against criminals are divided into two heads, those in which the person is charged by indictment, including those taken before the coroner, and those in which he is put to answer without indictment, being such as are taken by appeal. In 2 Hawk. P. C., by Curwood, p. 77, book 2, c. 9, s. 17, an indictment of death taken before the coroner is mentioned; and Id., p. 83, "What authority a coroner hath to take an indictment of other matters" besides inquisitions of death is discussed. In 4 Bl. Comm. 802, speaking of the coroner's inquisition of the death of a man, when it finds any one guilty of homicide, "the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it; which brings it to a kind of indictment." In Bac. Abr. *Indictment* (B) it is said, "in all criminal cases, the most regular and safe way, and most *conso- [*265 nant to the common law, and the Statutes of Magna Charta, c. 29, 5 Edw. 3, c. 9, 25 Edw. 3, c. 4, 28 Edw. 3, c. 3, and 42 Edw. 3, c. 3, is by presentment or indictment of twelve sworn men."

Secondly. The objection that the inquisition omits to state the time at which the offence was committed is cured by stat. 6 & 7 Vict. c. 83, s. 2.

Thirdly. The objection that one of the jurymen was not present when the coroner and the other jurymen viewed the body is cured by stat. 6 & 7 Vict. c. 83, s. 2. [He cited *Reg. v. Perkin*, 7 Q. B. 165 (E. C. L. R. vol. 53).] It is not necessary that the jury should be sworn super visum corporis; it is only necessary that they should be sworn before they view the body: Statute de officio coronatoris, 4 Edw. 1, st. 2; Britton, Pleas of the Crown, by Kelham, ch. 1, ss. 3, 4, p. 12, ed. 1762. In *Rex v. Ferrand*, 3 B. & A. 260 (E. C. L. R. vol. 5), the jury were sworn in the first instance super visum corporis by a person who had no authority to administer the oath: the inquest was then adjourned, and the jury had no view of the body after they were resworn by the coro-

ner. The dicta of two of the Judges, Abbott, C. J., and Bayley, J., p. 262, if correctly reported, do not observe the distinction between the jury being sworn *super visum corporis* and being sworn to take the inquest *super visum corporis*. In the form of oath given in Sewell on the Law of Coroner, pp. 161-2, the words are, "touching the death of A. B. now lying dead, of whose body you shall have the view."

Temple and *Maule*, *contra*.—First. A conviction for murder or manslaughter on a coroner's inquisition without an indictment found by a grand jury is unknown in practice: 4 Bl. Comm. 301, note by *266] *Coleridge; Archb. Crim. Pl. and Evidence, by Welsby, p. 105, 15th ed. In all the cases and authorities with the exception of Sir William Withipole's Case, Cro. Car. 134, the word "indictment," when applied to a coroner's inquisition, is used in the sense of an accusation, and not as pointing out the instrument containing it. Sir Edward Coke, in his Commentary on Litt. sect. 194, says, 126 b., "il serra indite, or rather endite, and so is the original, for it commeth of the French word enditer, and signifieth in law an accusation founded by an enquest of twelve or more upon their oath, and the accusation is called *indictamentum*." Sir W. Blackstone, in his Comm., book 4, c. 23, pp. 30-1, explains the distinction between presentment and inquisition. "A presentment, *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, . . . upon which the officer of the Court must afterwards frame an indictment, before the party presented can be put to answer it." He then mentions the two kinds of inquisition, viz., inquisitions of office, which he says are not traversable (though Coleridge in his edition points out an inaccuracy in this statement) and other inquisitions which may be traversed and examined, such as the coroner's inquisition finding any one guilty of homicide; and, p. 302, explains an indictment as "a written accusation" "preferred to, and presented upon oath by a grand jury." [He also cited 2 Hale, P. C., c. 19, p. 152; c. 22, p. 157; 2 Hawk. P. C., by Curwood, p. 287, c. 25, s. 1.] In 2 *267] Inst. on Magna Charta, c. 17, p. 32, the word "indictment" is used in connection with the duties and powers of the coroner. And in stat. 2 & 3 Edw. 6, c. 24, s. 2, the words "whether it shall be founden before the coroner, &c.," are introduced, otherwise the enactment would not have extended to the case of an inquisition before the coroner. In 4 Inst. c. 59, on the court of the coroner, it is said, "He ought to deliver the inquisition of death taken by him at the next gaol delivery, or certifie the same into the King's Bench." In stat. 1 & 2 P. & M. c. 13, s. 5, indeed, persons are said to be "indicted" upon an inquisition before a coroner: but that statute and stat. 7 G. 4, c. 64, s. 4, use the word "inquisition," not "indictment," and the word inquisition must mean the instrument because the coroner is to sign it. Sect. 20 of the latter enacts that "no judgment upon any indictment or information for any felony or misdemeanour" shall be stayed or reversed "for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence." But this enactment was considered as not extending to coroners' inquisitions: 2 Chit. Stats. by Welsby and Beavan, p. 15, note (a), otherwise stat. 6 &

7 Vict. c. 83, s. 2, would have been unnecessary. [They referred to the recital.] [SHKE, J.—In stat. 7 G. 4, c. 64, s. 4, a particular kind of indictment before a coroner's jury is called an inquisition, which would afford a strong argument that the provisions of sect. 20 were not intended to apply.] In stat. 19 & 20 Vict. c. 16, which empowers this Court to transfer the trial of certain offenders to the Central Criminal Court, an inquisition is always specified when it is intended to be dealt with. [They referred to sects. 1, 2, 4, 7, 8.] The distinction between the two is kept up in 3 Burn Just., by Bere and Chitty, which contains separate titles **"Indictment,"* and *"Inquest and Inquisition."* [*268 Stat. 24 & 25 Vict. c. 100, unquestionably refers to indictments: and there is great reason for requiring the cause of the death to be set forth in the coroner's inquisition because the jury may not have before them an indictment preferred with the skill employed on indictments preferred before the grand jury.]

Secondly. Though the inquisition alleges that the killing was felonious it should also state when the act which caused the death was committed. [BLACKBURN, J.—Stat. 6 & 7 Vict. c. 83, s. 2, renders that unnecessary where time is not of the essence of the offence. You must argue that time is always of the essence of the offence, and then you make the enactment very inefficient.]

Thirdly. The reasons for the presence of the coroner during the view of the body by all the jurymen founded on the statute *de officio coronatoris*, 4 Edw. 1, st. 2, s. 2, are given in 2 Hale P. C. 58: "The coroner cannot take an inquisition but upon the view of the body, and if he doth, such inquisition is void; and the reason is, because oftentimes much of the evidence ariseth upon the view, for the inquisition ought to contain the manner of his death, the place, length and depth of the wound, &c." As far as regards the jurisdiction of the coroner, the body is part of the evidence: *Rex v. Ferrand*, 3 B. & A. 260, 264 (E. C. L. R. vol. 5), per Abbott, C. J., and Best, J. [COCKBURN, C. J.—In that case the jury had not a view of the body after they had been sworn by the coroner himself, and therefore the inquisition was clearly void.] The form of oath given in 2 Burn Just., by Bere and Chitty, p. 48, containing the words "here lying dead," indicates that the oath should be taken in the presence of the body. In 2 *Hawk. P. C. by Curwood, p. 80, [*269 book 2, ch. 9, s. 24, it is said, "If a coroner take an inquest after a body hath been so long buried, that it may reasonably be presumed that the view of it could be of no manner of use for the information of the jurors, the Court into which the inquisition is returned will in discretion refuse to receive or file it," citing in margin "*Rex v. Causey*, Hilary 3 G. 1, Strange, 22.(a) [COCKBURN, C. J.—I cannot see the reason for all the jurors being present at the view at the same time and the coroner with them. If there be proof that a man has been shot, I cannot see the reason for a view of his body.] The principle, that the coroner should be present with each section of the jury which views the body, is not altered by stat. 6 & 7 Vict. c. 83, s. 2, which enacts that no inquisition found upon or by any coroner's inquest shall be quashed "because the coroner and jury did not all view the body at one and the same instant, provided they all viewed the body at the first sitting of the

(a) The case is reported in 1 Str. 22, nom. *Rex v. Bond*.

inquest." [BLACKBURN, J.—According to grammatical construction, the word "all" does not apply to the coroner. COCKBURN, C. J.—If not, the word "coroner" is superfluous, and the clause ought to have mentioned the jury only.]

COCKBURN, C. J.—I am of opinion that this rule should be discharged.

The first question is, whether sect. 6 of the recent statute, 24 & 25 Vict. c. 100, which enacts that "in any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused," applies to an inquisition *270] taken before a coroner. *I am of opinion that it does. Upon a review of the older authorities in our criminal law, with reference to coroners' inquisitions, it is clear that the term "indictment" was understood by them as well as by the Legislature to comprehend a coroner's inquisition, upon which a person might be put on his trial for murder or manslaughter. The earliest statute bearing upon the question is the 11 H. 4, c. 9, the effect of which was considered by all the Judges in Sir William Withipole's Case, Cro. Car. 134. That statute, after reciting that of late inquests were taken at Westminster by persons named to the justices, without due return of the sheriff, and who ought not to be on the jury, "by whom as well many offenders were indicted, as other lawful liege people of our lord the King not guilty," goes on to provide, that in future no indictment be made by any such persons, but by inquests of the King's lawful liege people returned by the sheriffs. It was urged, by the minority of the Judges in the case referred to, that this statute was made with reference to inquests before justices, and that no provision had been made for an inquisition before a coroner; nevertheless it was thought by the majority that the word "indictment" as used in that statute applied to inquests held before coroners. In stat. 2 & 3 Edw. 6, c. 24, s. 2, it is provided, that an indictment found by the jurors of the county where the death shall happen, whether before the coroner or before the justices, shall be good and effectual in law: an indictment found before the coroner can only apply to the finding by a coroner's jury; so that the statute recognises an inquisition taken by a coroner in a case of murder or manslaughter as an indictment. Again, in stat. 1 & 2 P. & M., c. 13, s. 5, the Legislature applies the term "indicted" *271] to the finding of the jurors upon an inquisition before a coroner. The term "indictment" is used in the same sense in the passage cited from 2 Inst. 32; and again at p. 550: "Hereby it appeareth, that by the common law the coroner of the county could not intermeddle within the vierge, but the coroner of the vierge, and that if he took an indictment of the death of man, it was not allowable in law; and so it is if the coroner of the King's house take an inditement of the death of man out of the vierge, it is void, and coram non judice. And if an inditement of the death of a man being slain out of the vierge, be taken before the coroner of the King's house, and the coroner of the county, and so entered of record, it is insufficient." This language of Lord Coke, that great authority and expounder of the law, with reference to the finding of the jury on a coroner's inquisition, sufficiently shows, independently of the argument on the statutes, that the term in-

dictment in its true legal sense of the term was properly applicable to a finding by any jury.

In later legislation, for the purpose of getting rid of technicalities which interfered with the course of criminal justice, stat. 14 & 15 Vict. c. 100, s. 4, enacted that in an indictment for murder or manslaughter it should no longer be necessary to state the cause of the death with particularity of detail. The term in sect. 4 is "indictment;" but by the interpretation clause, sect. 30, that is to be understood not only in its narrower sense, but to include an inquisition also. Thus the law remained until the passing of stat. 24 & 25 Vict. c. 100, which re-enacts, in sect. 6, the provision of the 4th section of the former Act. Unfortunately, sect. 4 of stat. 14 & 15 Vict. c. 100, having been repealed by stat. 24 & 25 Vict. c. 95, the omission to mention inquisition in sect. 6 of stat. 24 & *25 Vict. c. 100, gives rise to the argument that [*272 the Legislature intended to restore the old state of the law as to inquisitions taken before coroners, and that in them it is therefore still necessary to set out the cause of the death, which was rendered unnecessary by stat. 14 & 15 Vict. c. 100, s. 4. The argument is plausible; but I cannot think that such was the intention of the Legislature. Stat. 24 & 25 Vict. c. 100, does not recite, nor is it suggested, that the alteration of the law by stat. 14 & 15 Vict. c. 100, had been productive of inconvenience or mischief with reference to coroners' inquisitions. And there is no reason why the Legislature, in an Act passed to consolidate and amend the statute law relating to offences against the person, should have restored those technical difficulties and embarrassments in the case of inquisitions before coroners from which ordinary indictments are free. Nor do I see the force of the argument of the defendant's counsel that a minute statement of details is necessary, in the case of inquisitions found by a coroner's jury, because they may not have before them an indictment prepared with the skill employed on indictments preferred before the grand jury. In the one case as well as in the other depositions are taken, and the prisoner knows what he is charged with. The probability is, that the interpretation clause found in stat. 14 & 15 Vict. c. 100, was considered superfluous and unnecessary by the framers of stat. 24 & 25 Vict. c. 100. And I am of opinion that, according to legislative exposition and the authority of text writers, the word "indictment" in sect. 6 of the recent statute needs no interpretation clause to make it apply to coroners' inquisitions.

Some difficulty is presented by the joint effect and operation of stats. 7 G. 4, c. 64, and 6 & 7 Vict. c. 63. *The former, which was [*273 passed for improving the administration of criminal justice, introduced in sect. 4 provisions as to the duties of coroners; and in sect. 20, which remedies some general mischiefs arising from technicalities, mentions indictments and informations generally. If this section had stood alone, there would have been no difficulty in applying it to coroners' inquisitions. It is, however, followed by stat. 6 & 7 Vict. c. 83, to amend the law respecting the duties of coroners; and sect. 2 of the later statute not only gets rid of some technical objections to coroners' inquisitions, but contains a re-enactment of the provisions in stat. 7 G. 4, c. 64, s. 20. A fair argument has been founded upon this, viz., that the framers of the later enactment must have been persuaded that sect. 20 of stat. 7 G. 4, c. 64, did not embrace the case of a coroner's

inquisition. That may have been their belief. The enactment, however, is not a declaratory statute; and if we are satisfied independently of that enactment that sect. 20 of the former statute would embrace a coroner's inquisition, we ought not to say that it does not because out of excessive caution a statute passed seventeen years after contains an enactment which was unnecessary if the word "indictment" includes "inquisition."

The objection, that one of the jurors viewed the body separately from the others, is cured by stat. 6 & 7 Vict. c. 83, s. 2, which enacts that no inquisition found upon or by any coroner's inquest shall be quashed "because the coroner and jury did not all view the body at one and the same instant, provided they all viewed the body at the first sitting of the inquest." The true construction of this clause is, that if the *274] coroner and all the jurors *view the body at the first sitting, it is not necessary that they should all be present at the same time when they view the body, nor that the coroner should be present when they all view it. It is important that the jury should hear from the coroner the observations which the state of the body may suggest, but he sums up the evidence to the jury, and the symptoms which the dead body exhibits are part of that evidence: it is not necessary for the purposes of justice that the observations should be made during the view. The Legislature intended to meet the case where the body might be lying in one part of a building and the jury were sitting in another, and one or more of the jurors had not a view of the body at the same time as the others. Here, therefore, all of the jurors having been sworn, and having seen the body, and having heard the observations of the coroner, that which would have been a fatal objection before stat. 6 & 7 Vict. c. 83, is cured by sect. 2.

BLACKBURN, J.—The first and principal question is, whether stat. 24 & 25 Vict. c. 100, s. 6, applies to an accusation of a person by a coroner's jury on which he may be put upon his trial.

It is clear, both upon reason and the authorities, that in old times the word "indictment" included all charges of a criminal nature made upon oath by an inquest which had power to make the inquiry; although the term is now more generally understood to signify such a charge when reduced into writing: *Bac. Abr. Indictments*, p. 295. In all charges of felony the first step is that not less than twelve lawful men are sworn to make inquiry; and the ordinary case is that of the grand *275] jury, who are *summoned to inquire at the Assizes into all crimes and offences which they are informed of, or at the Quarter Sessions into a limited number of crimes and offences, that is to say, such as the justices at Quarter Sessions have power to try; and at the Assizes or Quarter Sessions, as the case may be, to present offenders. Having been sworn they make inquiry, and when they find a particular charge, and that finding is reduced into writing, it becomes a record of the Court. In practice, a written charge is brought to them in the shape of a bill, and if they adopt it they do no more than write upon the back of it "a true bill;" but when it is put on record it purports to be in the present tense, "the jurors, &c., upon their oath present," "and so the jurors aforesaid, upon their oath aforesaid, do say," "and the jurors aforesaid, upon their oath aforesaid, do further present," as if according to the practice in old times, their presentment and finding

were verbally stated in Court and taken down in writing and made a record.

The coroner has a more limited authority, viz., to make inquiry by a jury upon the dead body; but in those cases in which he has authority the proceedings are in substance the same as those before a grand jury; and all the requisites of the indictment are the same; the accusation by the coroner's jury is equally an accusation, which is the result of their opinion of the evidence adduced before them, and upon which a person may be tried, as that of the grand jury, and the judgment upon the one is like a judgment upon the other. Can then the finding of the jury upon such an inquiry before the coroner be properly called an indictment? In the passage cited from 2 Inst. 32, Lord Coke uses *language which clearly shows that he considered it an indict- [*276 ment. It was so held in Sir William Withipole's Case, Cro. Car. 134, which was decided upon the construction of stat. 11 Hen. 4, c. 9. That statute begins with a recital describing indictments by a grand jury at Westminster, and stating that such indictments had been found by improper persons, and proceeds to enact that they should be annulled, and further "that from thenceforth no indictment be made by any such persons, but by inquests of the King's lawful liege people;" and so forth. No question seems to have arisen upon this statute until the time of Charles I. The question was then raised, in Sir William Withipole's Case, whether it applied to coroner's inquisitions, and the majority of the Judges held that it did. The minority did not say that the word "indictment" was not large enough to include a coroner's inquisition, but said (and if the matter were res integra I should think their reasons of great force) that because the recital of the statute begins with inquests before the justices, and mentions denomination to the sheriff or bailiff of the franchise, whereas an inquisition before the coroner is to be made by the bailiffs or constables of the four next adjacent villages in pursuance of stat. 4 Edw. 1, st. 2, and no challenge can be made of any of the inquest before coroners, the meaning of the word was cut down to a finding by the grand inquest. That view was not adopted by the majority, but it shows that in the opinion of all the Judges, the word "indictment" is large enough to apply to a coroner's inquisition as well as to the indictment of a grand jury.

I pass to the question, the only one on which I have had any doubt, whether the word is used in stat. 24 & *25 Vict. c. 100, s. 6, in [*277 a restricted sense? No doubt, in common talk, "indictment" does not mean "inquisition," and if the Legislature had indicated that they used it in that limited sense it would not apply to a coroner's inquisition. But on the whole I think that there is not enough to show that the Legislature intended to exclude such inquisitions from the operation of the statute. The statute applies to the whole criminal procedure: many persons think, and I am one of them, that the sooner the practice of putting a person upon his trial on a coroner's inquisition is altered the better; but that is no reason for laying traps for making such inquisitions bad. And when the Legislature were removing objections taken upon technical grounds, I should expect to find that they would remove them in the case of inquisitions as well as in the case of indictments. An opinion seems to have been entertained that the word "indictment" in stat. 7 G. 4, c. 64, s. 20, did not apply to coroners' inquisitions,

because, in sect. 4, the word "inquisition" is used separately; but that is not a declaratory Act, and, in the absence of any judicial decision on sect. 20, I think it would apply to such inquisitions. As, however, the doubt existed, Lord Campbell thought it worth while, in framing stat. 14 & 15 Vict. c. 100, to introduce the interpretation clause, sect. 30; and it would have been better if the framer of the recent Act, 24 & 25 Vict. c. 100, had used the same precaution. But the object of the Act applies equally to each; and we are bound to hold that sect. 6 applies to indictments and accusations by coroners' inquisitions as well as to those found by the grand jury.

On the third point I agree perfectly with the Lord Chief Justice. *278] An opinion was expressed in *Rex v. Ferrand*, 3 B. & A. 260 (E. C. L. R. vol. 5), that in order to make an inquisition valid, the coroner and jury must both view the body at the same time; but the language of stat. 6 & 7 Vict. c. 83, s. 2, could not be more express if this opinion had been before the mind of the Legislature. Therefore this objection is cured.

The second point was either answered or given up during the argument.

SHEE, J.—We have to put a construction upon the word "indictment" in stat. 24 & 25 Vict. c. 100, s. 6, which is in effect the same enactment as stat. 14 & 15 Vict. c. 100, s. 4. In the earlier statute there is an interpretation clause which has not found its way into the later; and it has been strongly contended that for that reason the word "indictment" in the latter is to be remitted to the meaning which the Legislature is said to have attached to it in stat. 6 & 7 Vict. c. 83, and not construed so as to include a coroner's inquisition. The argument of the defendant's counsel was founded on this, that, in all the statutes in which the word "indictment" has been used to apply to coroners' inquisitions, it meant the accusation and not the instrument containing the accusation; and that, as in stat. 24 & 25 Vict. c. 100, s. 6, the word has reference to the instrument itself, it must be limited to indictments found by the grand jury. But, in stats. 2 & 3 Edw. 6, c. 24, s. 2, and 1 & 2 P. & M. c. 10, s. 5, the word is used as meaning the written instrument. And in modern times we find that for ten years from the passing of stat. *279] 14 & 15 Vict. c. 100, the word was understood and taken to mean both, and therefore on the statutes alone I should find it impossible to come to any other conclusion than that in stat. 24 & 25 Vict. c. 100, s. 6, the word "indictment" must have the same extensive meaning as it had for ten years before.

Moreover, when we look at the text books we find that the word "indictment" frequently means the written instrument as well as an accusation. In 2 Hale C., c. 19, p. 153, "The several kinds of presentments, inquisitions and indictments in matters capital" are distinguished. 1. In relation to the Courts or jurisdictions where they are made:—"Some are in the leet, some in the sheriff's Turn, some before the coroner, some before justices of peace, justices of oyer and terminer, gaol delivery, King's Bench:" there the word "indictment" means the instrument containing the accusation. In 2 Hawk. P. C., by Curwood, p. 291, book 2, ch. 25, s. 6, a man is said to be indicted on an inquisition found by a coroner's jury, and the written instrument is called an indictment.

As to the other objection, I agree that it is answered by the words of stat. 6 & 7 Vict. c. 83, s. 2; for the word "jury" means the jurymen or jurors.

Rule discharged.

*EX PARTE BROWN. May 7.

[*280

Habeas corpus ad subjiciendum.—*Foreign dominion of Crown.*—25 & 26 Vict. c. 20, s. 1.—*Isle of Man.*—*House of Keys.*—*Commitment for contempt.*

Stat. 25 & 26 Vict. c. 20, s. 1, enacts, that no writ of habeas corpus shall issue "into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court or Courts of justice having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion." In an act passed in the Isle of Man in 1817, "for altering and amending the criminal law in the said Isle," is the following proviso: "that nothing herein contained shall extend or be construed to extend to affect, abridge, or alter the power of Courts of justice and magistrates to punish contempts as formerly accustomed; and that the House of Keys, the Clerk of the Rolls, and the Registrars of the Ecclesiastical Courts, when in the execution of their respective offices, have and shall have the power of punishing contempts in like manner as any Court or magistrate within the said Isle."

1. Held, that the Isle of Man is not a *foreign* dominion of the Crown, and therefore a writ of habeas corpus ad subjiciendum issues to it, notwithstanding stat. 25 & 26 Vict. c. 20, s. 1.

2. *Quære*, whether a colony or foreign dominion of the Crown, in which there is a Court having authority to issue a writ similar in its nature and effect to the writ of habeas corpus, is within that statute?

3. Held, that the House of Keys as a legislative body has not inherent power to commit for contempt; and that The Manx Act of 1817 did not give such power to it when acting in its legislative capacity.

In this Term *Welsby* obtained a rule, calling upon Noel Gillett, gaoler of the gaol of Castle Rushen in the Isle of Man, to show cause why a writ of habeas corpus ad subjiciendum should not issue directed to him, commanding him to have before this Court the body of James Brown, together with the day and cause of his taking and detainer. The applicant had been committed to the gaol of Castle Rushen under the following warrant:—

"Isle of Man } House of Keys, 16th March, 1864, by adjournment
to wit. } from the 15th March inst. Whereas it has been resolved
by this House that certain libellous and scandalous paragraphs published
in the newspaper called The Isle of Man Times and General *Advertiser on the 27th day of February last, and incorporated with [*281
what purports to be a report of the proceedings of this House, and also
a certain libellous and scandalous article published in the said newspaper
on the 5th day of March instant and headed 'The House of Keys and
the Town Commissioners,' and also a certain other libellous and scandalous
article published in the newspaper on the 12th day of March
instant, and headed 'The House of Keys and the Town Commissioners,'
are a contempt of this House and a breach of its privileges. And
whereas it having been resolved and ordered by this House that James
Brown, of the town of Douglas, the printer and publisher of the said
newspaper, be summoned to attend at the bar of this House on this
Wednesday, the 16th day of March instant, at the hour of 11 o'clock
in the forenoon, to answer for such contempt and breach of privileges
of this House; and the said James Brown accordingly this day attended
at the bar of this House, and having in the first instance called upon
this House to prove that he is the printer and publisher of the said

newspaper, but having subsequently admitted at the said bar that he is the printer and publisher of the said newspaper and of the said paragraphs and articles: It is therefore hereby resolved that the said James Brown, by the publication of the said libellous and scandalous paragraphs and articles in the said newspaper during the present Session of this House, is guilty of a contempt of this House and a breach of its privileges, and it is therefore hereby resolved and ordered that the said James Brown be forthwith arrested and committed a prisoner to the gaol of Castle Rushen, there to remain for the space and term of six calendar months, and that the body of the said James Brown be kept *282] in the said *gaol by the gaoler thereof for and during the said space and term of six calendar months from the day of his imprisonment under this warrant."

The warrant was signed by the Speaker and twenty other members of the House, and was directed "To the chief and other constables and the gaoler of Castle Rushen and whom this may concern."

Robert John Moore, a member and secretary of the House of Keys, and an advocate practising at the bar of the Isle of Man, and John Moore Jeffcott, a member of the said House, and an advocate practising at the bar of the said island, deposed that they were acquainted with the constitution and practice of that House and conversant with the laws of the island. "The House of Keys is the lower branch of the Court of Tynwald, which consists of the Governor or Lieutenant Governor and the council (forming one branch), and the House of Keys; and Her Majesty and the said Court of Tynwald form the Legislature of the island. The said House has also judicial functions in cases of appeal from the verdicts of juries. The said House of Keys exercises its legislative functions separate and apart from the upper branch of the said Court."

The House is assembled for the transaction of business by the precept of the Governor (or Lieutenant Governor) issued to the several coroners of the island, and such House was duly assembled at their usual place of meeting in Castletown, on the 26th November, 1863, for the purpose of transacting legislative business, the following being a copy of the precept issued by His Excellency Henry Brougham Loch, Esq., Lieutenant Governor, for that purpose to one of the coroners. "You are *283] hereby ordered and required to give personal notice to such of *the members of the House of Keys as reside within your sheading to meet at their house in Castletown, on Thursday, the 26th day of November instant, at 11 o'clock in the forenoon, to consider The Isle of Man Disafforestation (Compensation) Bill, and such other matters as may then and there be laid before them. And after such summons has been given you are to return proper certificates thereof, together with this precept, to the Rolls Office, on or before the said day. Given at Castle Rushen, the 19th day of November, 1863. (Signed), Henry B. Loch. To the Coroner of Glenfaba Sheading." "The said House, when assembled, has power to adjourn its sittings from time to time, and such House does not require the consent of the Lieutenant Governor to such adjournment, nor does the Lieutenant Governor in anywise prescribe to the Keys the day to which they may adjourn, nor adjourn them." The House, on the 26th November, 1863, adjourned until the 4th December, 1863, on which day it again adjourned to the 23d Feb-

ruary, 1864. The House again met on that day, and sat from day to day until the 26th February, the sitting having been duly adjourned from day to day, and on the last mentioned day the House was adjourned until the 15th March. The House met on that day and sat from day to day until the 18th March, the sittings having been duly adjourned from day to day, and on the last mentioned day the House was adjourned to the 12th April, on which day and on the following day the House sat, and on the latter day the House adjourned to the 26th April. The House met on the last mentioned day, and adjourned from day to day until the 28th April, and at its rising it was further adjourned to the 7th June, 1864, the business before the House not having been finished.

*The Session of the House terminates on the completion of [*284 the business before it, when no further adjournment takes place. The present Session of the House commenced on the 26th November, 1863, and has been duly continued by adjournment from time to time as hereinbefore mentioned, and such Session has not yet terminated. During such Session of the House part of the business brought before it was a bill for the improvement of the town of Douglas. "All orders and proceedings of the said House of Keys made within the authority or jurisdiction of the House are by the law of the said Isle valid as orders and proceedings of the said House if signed by thirteen members thereof."

James Gell, an advocate practising at the bar, and well acquainted with the law, practice and procedure of the Courts of the Isle of Man, deposed, "that in the said island there is a lawfully established Court of Her Majesty the Queen, called 'The Staff of Government,' which has authority to grant and issue a writ or order by which any person whose liberty is restrained in the said island in a common gaol or otherwise, whether it be for a criminal or civil cause, can have his body removed into such Court; and such Court has authority to examine the legality of the imprisonment or detention of such person, and to discharge him if illegally imprisoned or detained, and that the said Court has authority to insure, and can insure, the due execution of such writ or order throughout the said island: and that such writ or order, and the proceedings thereon, are in their nature and effect like a writ of habeas corpus, commonly called a writ of habeas corpus ad subjiciendum, issued in England, and the proceedings thereon; and that the said Court on such proceedings *has authority to decide, and is [*285 bound on application being made to it to decide, on the legality of any such imprisonment or detention, and to discharge any person illegally imprisoned or detained in the said island; and that an appeal lies to Her Majesty in council from the decision of the said Court on the legality of any such imprisonment or detention."

In an Act of Tynwald, promulgated in the year 1817, intituled "An Act for altering and amending the criminal law of the said island," it is enacted, sect. 31, "that the malicious striking and making affray in any of the Courts of justice of the island, or the using threatening and reproachful words to the Judge or Court, the Judge or Court being then sitting, is and shall be held to be a misdemeanor, and punishable by fine and imprisonment."

Sect. 32. "That the wilfully obstructing any officer or other person in the execution of lawful process, or the wilful forbearance and neglect

of any coroner, constable, or other officer to execute any writ, process, warrant or other legal instrument lodged in his hands for the purpose of being duly executed; that the breaking prison by a person lawfully imprisoned; that the forcibly rescuing or attempting to rescue a person who shall be lawfully imprisoned; that the escaping or attempting to escape by a person lawfully arrested; that the voluntarily permitting or negligently suffering a person to escape, who shall be lawfully arrested or confined, or the wilfully permitting by any coroner, constable, or other officer, of any person or persons to be at large, when such person or persons may and ought to be arrested and taken by such coroner, *286] constable, or other officer, are and shall be severally held to be *misdemeanors, punishable by fine and imprisonment: Provided always, and be it further enacted and declared, that nothing herein contained shall extend or be construed to extend to affect, abridge, or alter the power of Courts of justice and magistrates to punish contempts as formerly accustomed; and that the House of Keys, the Clerk of the Rolls, and the Registrars of the Ecclesiastical Courts, when in the execution of their respective offices, have and shall have the power of punishing contempts in like manner as any Court or magistrate within the said Isle,"(a) which proviso has not been repealed, and is still the law of the island.

In an Act passed in the year 1737 is the following proviso: "And that Courts of justice and magistrates doing the duty of their offices shall have and continue the power of committing and fining any person or persons of contemptuous behaviour insulting or abusing them or any of them in the execution of their duty according as the nature of the offence shall demerit," which proviso has not been repealed, and is still the law of the island.

"Courts of justice in the said Isle have and exercise the power of punishing by fine and imprisonment, or by either, for contempts; and whether such contempt be committed in the actual presence of the Court or not."

The grounds on which the rule was moved for were:—First, That the House of Keys as a legislative body had no power to commit for contempt. Secondly, That such a power, if it existed, could not be *287] exercised for *a contempt during the recess after prorogation. Thirdly, That the commitment was bad, being for a time certain, viz., for six calendar months.

The affidavits in opposition to the rule did not show that the House of Keys as a legislative body had ever before exercised the power to commit for contempt.

Mellish and *Kemplay* showed cause.—The first question is, whether the Court has power to send a writ of habeas corpus to the Isle of Man. Stat. 25 & 26 Vict. c. 20, which was passed in consequence of such a writ having been sent to Canada in *Anderson's Case*, 30 L. J. Q. B. 129, 7 Jur. N. S. 122, enacts, sect. 1, "No writ of habeas corpus shall issue out of England, by authority of any judge or Court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court or Courts of justice having

(a) These enactments are contained in "The Lex Scripta of the Isle of Man, comprehending the Ancient Ordinances and Statute Laws," Douglas, 1819; which book was referred to in the affidavit of James Gell, advocate.

authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion." In *Crawford's Case*, 13 Q. B. 618 (E. C. L. R. vol. 66), this Court seemed to think that before stat. 5 G. 3, c. 26, by which the rights of sovereignty in the Isle of Man were vested in the Crown of England, this writ would not run into that island. [COCKBURN, C. J.—The Isle of Man is within the four seas. BLACKBURN, J.—In stat. 25 & 26 Vict. c. 20, s. 1, the epithet "foreign" is prefixed to "dominion" for the purpose of distinguishing the Channel Islands and the Isle of Man from Malta, Gibraltar or India. *Welsby*, for the applicant.—In *Rex v. Cowle*, 2 Burr. 834, 856, Lord Mansfield distinguishes between foreign dominions to which the Court has no power to send any writ, as Scotland and the Electorate, and those to which this writ may be sent, as Ireland, *the Isle of Man, the plantations, and the Channel Islands. MELLOR, J. [*288 —He puts the Isle of Man on the same footing as the plantations, which are clearly not within stat. 25 & 26 Vict. c. 20, s. 1.] Before stat. 5 G. 3, c. 26, it was not governed by English laws; and in regard to bills of exchange it was treated as foreign until The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, which, by sect. 7, includes among inland bills those drawn in or upon any person resident in the Isle of Man; also it is not part of the United Kingdom within sect. 24 of The Bankruptcy Act, 5 & 6 Vict. c. 122; *Davison v. Farmer*, 6 Exch. 242. [COCKBURN, C. J.—The Habeas Corpus Acts, 31 Car. 2, c. 2, s. 11, and 56 G. 3, c. 100, ss. 1, 5, mention the "dominion of Wales" without the adjunct "foreign," which shows the distinction between "dominion" and "foreign dominion" of the Crown.] As soon as a dominion of the Crown has its own Legislature and Courts, it becomes a foreign dominion as distinguished from a colony.

Secondly. The Staff of Government in the Isle of Man is a Court having authority to issue a writ which is in the nature of and has substantially the same effect as the writ of habeas corpus. Stat. 25 & 26 Vict. c. 20, s. 1, was not intended to be confined to colonies or dominions of the Crown in which there were Courts, according to the common law of England, having authority to issue a writ of habeas corpus strictly so called. This appears from sect. 2, which provides that the Act shall not affect or interfere with any right of appeal to the Queen in council, for an appeal lies from the order of the Staff of Government to the Privy Council; whereas there is no appeal from the decision of one of the superior Courts at Westminster granting or refusing a writ of habeas corpus. [SHEE, J.—In *Re The Justices of the Supreme Court of Judicature at Bombay*, 1 Knapp P. C. C. 1, the question, [*289 whether the Supreme Court of Bombay, established under Royal charter, had the same power of issuing the writ of habeas corpus which this Court has, was discussed.]

Thirdly. The House of Keys had power to commit for this contempt. At the time when the libel was published, the House was in Session, which continued, subject to a short adjournment, up to the time of the committal. A legislative body does not possess, as a legal incident, the power to commit for contempt committed out of the House; *Kielley v. Carson*, 4 Moo. P. C. C. 63, (a) overruling *Beaumont v. Barrett*, 1 Id. 59; but the House of Keys has that power by the Manx Act passed in

(a) See also *Fenton v. Hampton*, 11 Moo. P. C. C. 347.

1817. It is like the House of Lords, which has two functions, legislative and judicial, and the power to commit for contempt belongs to it generally. [BLACKBURN, J.—The House of Lords, when sitting legislatively, has that power by prescription; when the Lords are sitting as a judicial body they have it in their own right. *Welsby*.—Sir Edward Coke explains the title “House of Keys” in 4 Inst. 284, “if any case be ambiguous and of greater weight, it is referred to 12, which they call *claves insulæ*, the Keyes of the Island,” because they unlock the law. COCKBURN, C. J.—Sect. 32 of the local Act has reference to the House of Keys in its judicial capacity.] As a Court of justice, it would have that power without statute, and therefore it must have been intended in its legislative capacity. [COCKBURN, C. J.—It may have been mentioned in its judicial *capacity because it is a Court having extra-
*290] ordinary and anomalous powers.]

Welsby and *Milward*, in support of the rule, were not called upon.

COCKBURN, C. J.—I am of opinion that this rule should be made absolute.

The first question arises upon a preliminary objection taken to the jurisdiction of the Court to issue the writ of habeas corpus, by reason of the recent statute 25 & 26 Vict. c. 20. [His Lordship read sect. 1.] It is said that this enactment applies in the present case, because it is proposed to issue the writ into the Isle of Man, and the Isle of Man is a foreign dominion of the Crown. It is true that the Isle of Man does not form part of the realm of England; but the question remains, whether it is part of the foreign dominions of the Crown. I think that it is part of the dominions of the Crown, but not of the *foreign* dominions of the Crown. I assume that the Legislature, in adding the term “foreign,” meant to distinguish between those countries properly called “dominions of the Crown” and those properly called “foreign dominions of the Crown.” It is not necessary to lay down any precise line of demarcation between a “dominion” and a “foreign dominion;” though I understand the term “foreign dominion” to mean a country which at some time formed part of the dominions of a foreign state or potentate, but which by conquest or cession has become a part of the dominions of the Crown of England.

*291] The Isle of Man has always been in feudal subjection *to the Crown of England, although not immediately under the Crown, because it had a king of its own. In Com. Dig. *Navigation* (F. 2), the learned author treats largely of the Isle of Man; he says, “The Isle of Man was anciently governed by its own king, who was subject to the King of England.” And when this matter was before the Court of Chancery, in *Bishop of Sodor and Man v. Earl of Derby*, 2 Ves. Sen. 837, Lord Hardwicke said, p. 350, “It appears, from what is laid before me, especially under this grant and Act of Parliament, 7 Jac. 1, that Lord Derby as devisee (for so only can he claim) has not a title to the Isle and dominion of Man. As to the points taking in very large and diffusive learning I shall not determine, but touch upon them. Many things are admitted on both sides; that Man is not part of the realm of England; parcel only of the King’s Crown of England; a distinct dominion now under the King’s grants, and so ever since from a long time past granted; held as a feudatory dominion by liege homage of the Kings of England; the laws of England therefore as such extend not

to it, neither the common or statute law, unless expressly named, or some necessary consequence resulting from it. But notwithstanding that it was an estate and dominion in the King of England, not parcel of his realm, but of his Crown, which he could grant under his Great Seal, and, as said in Anderson, 2 Anders. 115, 116, could be granted by him in no other manner; because the Great Seal of England operates in all the dominions, not only parcel of the realm but of the Crown: the King therefore can grant lands in Ireland and the [*292 *plantations, Jersey and Guernsey, under the Great Seal of England, because part of his Crown." So, in Crawford's Case, 13 Q. B. 613 (E. C. L. R. vol. 66), Patteson, J., speaking of the Isle of Man, says, p. 625, "As at present advised, I am inclined to think that a writ of habeas corpus ad subjiciendum will run into the Isle of Man, since stat. 5 G. 3, c. 26, whatever might have been the law before that Act. The passage cited from Com. Dig. *Navigation* (F. 2) refers to the state of things prior to the statute. In *Bishop of Sodor and Man v. Earl of Derby*, 2 Ves. Sen. 387, 351, it was said that, although at the time, namely, 1751, the Isle of Man was not part of the realm, it was part of the King's dominions, being a feudatory of the King, and held by liege homage. It had been granted by James I. to the Earl of Derby, yet not as independent of the King, for the King was in some way the superior lord; and it was therefore considered that the question which had arisen there, between the Duke of Athol and the Earl of Derby, might be discussed in the English Court of Chancery if no other jurisdiction were affirmatively shown." These authorities satisfactorily establish that the Isle of Man, although not part of the realm of England, is part of the dominions of the Crown, and has from the earliest times been held in immediate feudal subjection to the Crown; and therefore cannot be treated as a foreign dominion of the Crown.

Even if it were a "foreign dominion," the question remains whether the condition mentioned in the first section of stat. 25 & 26 Vict. c. 20, namely, that there shall be in the colony or foreign dominion of the Crown a Court of justice "having authority to grant and issue [*293 *the said writ, and to insure the due execution thereof throughout such colony or dominion," applies here; it being conceded that the Isle of Man has no Court authorized to issue the writ of habeas corpus. I should be sorry to decide the present case on this narrower ground, because I desire to leave the question open whether that enactment applies here, although there is not a Court authorized to issue a writ of habeas corpus, properly so called, there is a Court having authority to issue a writ analogous in its character, and having the same operation. The statute evidently intended to prevent the issuing of the writ of habeas corpus where there was in the colony or foreign dominion a local tribunal by which the liberty of the subject could be effectually protected. And it may be that a Court authorized to issue a writ analogous in its character and consequences to the writ of habeas corpus would satisfy the terms of the enactment. I do not, however, intimate an opinion one way or the other on that question.

This Court, then, not being stripped of its power to issue the writ of habeas corpus, the next question is whether the circumstances of the case call upon us to issue it. It appears that the applicant has been committed for contempt by the House of Keys, that House when com-

mitting the prisoner acting not in its judicial but in its legislative capacity. It is conceded that in its legislative capacity it has never hitherto exercised the power of committing for contempt. And it has been decided by the Judicial Committee of the Privy Council that when the local Legislature has not, by prescription or by statute, the power of committing for contempt, that power is not necessarily inherent in it. If the House of Keys and the authorities of the island desire to review *294] that decision, *they can do so by making a formal return to this writ. At present we are bound by it.

The only other difficulty is with reference to the local Act of 1817; but, after the best consideration that I can give to that Act, it appears to me to apply to the House of Keys when in the exercise of its judicial functions. It is an Act for the administration of the criminal law, and for the protection of Courts of justice, and for enabling such Courts to commit for contempt while they are in the exercise of their judicial authority; whether as regards the provisions themselves, or their language, the Act cannot apply to the House of Keys when sitting in its legislative capacity.

Therefore the prisoner is illegally in custody, and is entitled of right to this writ.

BLACKBURN, J.—I agree that this writ must issue. It has been established by various decisions that the writ of habeas corpus can issue from this Court to the Isle of Man. Whether it can issue to the colonies abroad has not been expressly decided; but this Court, in a case where life and death were depending, (a) thought that there was sufficient doubt about the matter to issue the writ to Upper Canada, leaving the effect of it to be discussed afterwards. The facts there did not require that the question should be decided; and immediately after that case stat. 25 & 26 Vict. c. 20, was passed. Its title is, "An Act respecting the issue of writs of habeas corpus out of England into Her Majesty's possessions abroad;" the title, though no part of the Act, declares what the subject of it is. Sect. 1 enacts, "That no writ of habeas corpus *295] shall issue out of England into *any colony or foreign dominion of the Crown." The Isle of Man is not a "colony" but a "dominion" of the Crown of England, as Lord Hardwicke says in the passage from his judgment in *Bishop of Sodor and Man v. Earl of Derby*, 2 Ves. Sen. 337, 350, cited by the Lord Chief Justice, from time immemorial, "held as a feudatory dominion by liege homage of the Kings of England;" and certainly if it be a "foreign dominion," I cannot see what dominion of the realm of England there could be, not being part of England itself, that would not be a "foreign dominion." It seems to me that the dominions of the Crown of England, such as the Isle of Man, which have belonged to the Crown of England from time immemorial, are dominions with which the Legislature did not intend to interfere; and that those which have been acquired by conquest from foreign countries within the time of memory are the foreign dominions to which stat. 25 & 26 Vict. c. 20, refers.

This being so it is not necessary to give an opinion on the question whether, in order to bring the case within stat. 25 & 26 Vict. c. 20, s. 1, there must be in the colony or foreign dominion of the Crown a Court having jurisdiction to issue the writ of habeas corpus.

(a) *Anderson's Case*, 30 L. J. Q. B. 129; 7 Jur. N. S. 122.

I agree with the Lord Chief Justice that, according to the decision of the Judicial Committee of the Privy Council, in *Kielley v. Carson*, 4 Moo. P. C. C. 63,^(a) we are bound to say that the House of Keys, as a legislative body, has not inherent power to commit for contempt.

As to the construction of the Act of the Manx legislature, I think, looking at the whole scope of the Act, and considering that it is for the due administration of *justice in Courts of justice, it is impossible not to construe the 32d section as referring to the House of Keys when acting judicially. All the other persons mentioned in that section exercise judicial or ministerial functions; and in the present case the House of Keys was not acting as a judicial body when they committed the applicant for contempt. The alleged contempt was not a libel upon them as a judicial tribunal; but on their conduct in a legislative capacity, and as a legislative body, and therefore the Manx Act does not apply. [*296]

MELLOR, J.—The history of the connection of the Isle of Man with the Crown of England is to be seen from the authorities cited in *Crawford's Case*, 13 Q. B. 613 (E. C. L. R. vol. 66). Originally an island with a feudal obligation to the Crown of England, it was granted by James I. to the Earl of Derby. That state of things was found to be extremely inconvenient, and all the rights of sovereignty exercised by the Earls of Derby were purchased in pursuance of stat. 5 G. 3, cc. 26, 39, the effect of which was to transfer the island to and vest it unalienably in the Crown, reserving the rights of property and the manorial rights to the feudatory. Therefore it is now part of the dominions of the Crown. We may consider it as established by the authorities cited, and by *Crawford's Case*, 13 Q. B. 613 (E. C. L. R. vol. 66), and it was admitted by Mr. *Mellish*, that the writ of habeas corpus would run to the island unless it was within the prohibition in stat. 25 & 26 Vict. c. 20. That Act of Parliament was passed in consequence of *Anderson's Case*, 30 L. J. Q. B. 129; 7 Jur. N. S. 122, which left the question in doubt whether the writ would properly go to the colonies: *in order to prevent the recurrence of a similar case, sect. 1 [*297] prohibits the issuing of a writ of habeas corpus “out of England, by authority of any Judge or Court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court or Courts of justice having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion.” I am of opinion that the Isle of Man is not a “foreign dominion,” though a “dominion of the Crown;” and therefore it is not necessary to determine whether the words “having authority to grant and issue the said writ” are satisfied by an authority to issue an analogous or equivalent writ. I should be unwilling to decide, on the affidavits before us, that the authority of the Staff of Government in cases of illegal imprisonment or detention, would satisfy all the incidents of the writ of habeas corpus.

I agree with the observations of the Lord Chief Justice that the Act of the Manx legislature applies only to Courts of justice acting judicially, and not to an assembly acting in the exercise of legislative functions.

SHEE, J.—It is clear that the Isle of Man is not a “foreign do-

(a) See also *Fenton v. Hampton*, 11 Moo. P. C. C. 347.

minion" of the Crown of England. Without repeating what has been said by the Lord Chief Justice and my brethren as to the history and connection of this island with the kingdom of England, I may advert to Calvin's Case, 7 Co. 21, b, in which it is said that, although in the reign of Henry III. there was a King of Man called Artold, who sued for and obtained license from the King to come into England, and *298] although it appears *from the license granted to him that he was in some sense an absolute king, "yet," Lord Coke goes on to say, "none will doubt, but those that are born within that Isle, are capable and inheritable of lands within the realm of England." Therefore it cannot have been at any time considered, strictly speaking, a foreign country. Upon that and the other grounds stated by the other members of the Court, I think the Isle of Man is not a "foreign dominion" of the Crown.

Next I think that it is not a dominion of the Crown "where Her Majesty has a lawfully established Court or Courts of justice, having authority to grant and issue the said writ" of habeas corpus. And, since this committal for contempt is by the Supreme Court in the Isle of Man, there can be no other which has authority to issue that writ.

I do not add anything on the other points.

Rule absolute.

Kemplay.—It will not be necessary to issue the writ, because the Court would no doubt be of the same opinion if a return were made to it; and therefore the applicant will be discharged at once.

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*EX PARTE PATER. May 9.

Contempt of Court.—Quarter Sessions.—Jurisdiction.—Counsel.

1. Every Court of record has attached to its jurisdiction, as inherent in it, the power to punish for contempt: but if the Court is one of inferior jurisdiction, the Court of Queen's Bench has authority to intervene and prevent any usurpation of jurisdiction by it; and, if it treats conduct as a contempt which there is no reasonable ground for so treating, may interfere to protect the party upon whom the power to commit or fine for contempt has been improperly exercised.

2. A barrister may be punished for contempt of Court, even for language professedly used in the discharge of his functions as advocate.

3. The Court of Queen's Bench has, however, no jurisdiction to act as a Court of appeal in such cases. Therefore where, on a trial for felony at the Middlesex Quarter Sessions, the counsel for the prisoner, whose mode of conducting the case had been remarked upon by the foreman of the jury, in his address to the jury uttered words which reflected upon the foreman, and being required by the Judge to withdraw them refused, and was thereupon adjudged guilty of contempt and fined, upon motion for a certiorari to remove the order: Held, that as the words used might have been and were by the Judge adjudged to have been used to insult the juror, there was no excess of jurisdiction, and the Court of Queen's Bench could not interfere.

IN this term *Denman* (*McMahon* and *Kenealy* with him), moved for a rule calling upon the justices of the peace for the county of Middlesex to show cause why a writ of certiorari should not issue, directed to them, to remove into this Court all orders made by them at the General Sessions holden for that county, by adjournment, at the Clerkenwell Sessions House, in that county, on the 22d March last, concerning *Thomas Kennedy Pater*.

The affidavit of the applicant stated that he was engaged as counsel to defend one Robert Griffiths on an indictment for larceny, at the adjourned Middlesex General Sessions, in March last, in the Second Court, before Joseph Payne, Esq., acting as Deputy Assistant Judge of the Court. That in the course of the trial he *urged to the Court [*300 an objection against the course adopted by the prosecuting counsel, when he was interrupted by the foreman of the jury, who said "We know what all that is for, we know the object of such interruptions;" and on another occasion during the trial, in the discharge of his duty, he objected to the prosecuting counsel examining his own witness as if in cross-examination, and contended that as the witness had not shown himself to be hostile, it was not open to the learned counsel to cross-examine his own witness as if he were hostile, and added that to do so was very objectionable, as very little pressure only was sometimes necessary to induce a person to state that which was not the truth, and that immediately after he had made this objection he was again interfered with by the foreman, who said "That counsel had no right to insinuate that the witness was not speaking the truth," to which the deponent replied that it would be as well for him, the foreman, not to get into collision with him, the deponent. That these interferences were entirely unchecked by the Court, and were in tone and character such as to lead him to believe that the foreman had prejudged the case, and in consequence of that belief he, in his address to the jury, made the following observation:—"I thank God that there is more than one jurymen to determine whether the prisoner stole the property with which he is charged, for if there were only one, and that one the foreman, from what has transpired to-day there is no doubt what the result would be." That the Deputy Assistant Judge immediately said that that was a very improper observation to make, and insisted upon its withdrawal, and, upon the deponent declining to do so, he said he should take down the observation and consult the Assistant Judge, *Wil- [*201 liam Henry Bodkin, Esq., who was then sitting as Judge in the other Court, as to what should be done, and went to the other Court for that purpose, and on his return said he had consulted the Assistant Judge in reference to this matter, but it was his opinion that at that stage it would not be fair to interfere as it might prejudice the case against the prisoner at the bar, but when it was concluded they should then consider what course should be taken as regarded the deponent. That the deponent then resumed his address to the jury, and at the conclusion of the trial, and after the prisoner was convicted and sentenced, the Assistant Judge came into the Court presided over by J. Payne, Esq., and recommended him to treat the observation in question as a contempt of Court, and to inflict upon the deponent a fine of 20*l.*, and he was a short time afterwards fined 20*l.* by J. Payne, Esq. That before the fine was inflicted he wished to address the Court, but J. Payne, Esq., declined to hear him, and the fine was imposed without an opportunity having been given to him to show cause why the fine should not be inflicted. That, in order to ascertain whether the words set forth in this affidavit were the words considered to be the contempt of Court, he made an application to the Court the following morning, and was then informed by J. Payne, Esq., in open Court, that they were the words, and upon his applying for a copy of them J. Payne, Esq., said, "What you h-

read is sufficiently correct." That in making the observations during the trial he acted *bonâ fide* and according to the best of his judgment in discharge of the duty which he owed to his client, and had no thought of offering any contempt to the Court. That on the 19th April *302] the deponent received a letter from *the sheriff of Middlesex informing him that he had received process to levy on him a fine of 20*l.* for contempt of the Court of Quarter Sessions in March last, and unless such fine were paid into the office on or before a certain day it would be his duty to issue his warrant to enforce the same.

Denman, on moving.—First. The fine not having been estreated into the Exchequer, this Court has a right to interfere by certiorari for the purpose of examining the legality of the order of the Quarter Sessions, which is an inferior Court: *Anon.*, 1 Ventr. 836; *Rex v. Clement*, 4 B. & A. 218, 229 (E. C. L. R. vol. 6), per Bayley, J.; *Re Clement*, 11 Price 68, 87, per Wood, B. [COCKBURN, C. J.—The case in Ventr's is inapplicable. There the Quarter Sessions were acting *ultra vires*, for they fined a man for not obeying an order which they had no right to make.]

Secondly. The order when brought up must set out the facts constituting the contempt, in order to enable this Court to judge of their sufficiency, as was done in *Re Fernandes*, in Exch., 6 H. & N. 717; *s. c.* nom. *Ex parte Fernandez*, in C. P. 10 C. B. N. S. 3 (E. C. L. R. vol. 100), which was a stronger case than the present, inasmuch as the Court there was a superior Court. In the case of a superior Court, or of the Houses of Parliament, out of deference to the high character of the tribunal, setting out the facts is unnecessary: The case of *The Sheriff of Middlesex*, 11 A. & E. 273, 289, 292 (E. C. L. R. vol. 39), per Lord Denman, in delivering judgment.

*303] Thirdly. There is no precedent for fining a barrister *for contempt of Court for words spoken by him in the discharge of his duty. The nearest case is *Rex v. Davison*, 4 B. & A. 329 (E. C. L. R. vol. 6), where a party defending himself was fined, but that case seems questionable.

The COURT, saying that the case was one of very great importance, as affecting the independence of the bar and the discharge of the duties of advocates, granted a Rule nisi.

The affidavit of Joseph Payne, Esq., Deputy Assistant Judge of the Court of Quarter Sessions for the county of Middlesex, in opposition to the rule, stated that, in the course of the trial referred to, the applicant irregularly told the witness for the prosecution, who was under examination, that he was not speaking the truth. The foreman of the jury thereupon said that he thought the counsel had no right to tell the witness that he was swearing falsely. Whereupon the applicant immediately, in a loud, offensive and insulting tone and manner, said to the foreman, "You had better not get into collision with me, Sir," to which the foreman made no reply, and the case for the prosecution proceeded to its close. When the applicant rose to address the jury on the part of the prisoner he was in a state of great excitement, and began his address in the following words:—"I thank God there is more than one jurymen to determine whether the prisoner stole these articles, for if there was only one, and that one the foreman, from what has transpired to-day there is no doubt what the result would be." The applicant also

told the foreman *that he ought to be removed from the box and another put in his place. The above words were uttered by the [*304 applicant in a loud, threatening, insulting tone and manner, and accompanied with violent gestures, and the conduct of the applicant on that occasion appeared to the deponent to be calculated to provoke retaliation on the part of the foreman of the jury, and probably to lead to a breach of the peace. He thereupon stated to the applicant that he thought this was hardly the way to treat a gentleman who was discharging upon oath an important and compulsory duty in a Court of justice, and requested the applicant to withdraw the expressions he had used, as they might be taken to insinuate that the foreman of the jury would find the prisoner guilty on account of the previous collision with his counsel; to which the applicant answered that he would repeat the words again, which he did in the same loud, offensive, and insulting manner as before, and also added that if the deponent wished them to be taken down he would repeat them again, and would repeat them to the end of time. The deponent thereupon wrote down the words before-mentioned, and went into the adjoining Court to consult the Assistant Judge, and by his advice he allowed the case to proceed to the end without further notice in the mean time of the conduct and language of the applicant. After the case was over he requested the attendance of the Assistant Judge in his Court, and the applicant was thereupon requested by the Assistant Judge to withdraw the expressions he had used, the Assistant Judge saying to him, "Mr. Pater, now the case is over, surely you must see the impropriety of such remarks as you made." But the applicant, in the presence of the Assistant Judge; *of the deponent, and several other magistrates, again refused [*305 to withdraw, or in any way qualify, the expressions which he had used, or to make any apology for the same, or for the manner in which he had conducted himself. Whereupon the applicant was adjudged to have committed a contempt of the Court, and for such contempt was fined the sum of 20*l*. On the fine being imposed, the applicant said, addressing the deponent, "This shall not rest here. I shall bring the subject under the notice of Sir George Grey, and very probably your removal from the bench will be the result." That the conduct, manner and gestures of the applicant during the proceedings were violent, offensive and contemptuous, and were, in the judgment of the deponent, calculated to disturb and obstruct the due and proper administration of justice. That on a trial before the deponent, at a former Session of the peace for the county of Middlesex, held a few weeks before, as the deponent had finished his summing up, the foreman of the jury pronounced a verdict of guilty without at that moment consulting his brother jurors, whereupon the applicant said to the foreman, in a rude manner, "You have not done your duty." To this the foreman replied that they had before agreed upon their verdict, but did not think it right to interrupt the summing up of the Judge; upon which the applicant said to the foreman, "You are a wicked old man, and are quite old enough to know your duty better." The whole of the jury having expressed themselves strongly in reprobation of the conduct of the applicant, the deponent forebore on that occasion to inflict any fine upon him, hoping that such reprobation would be a sufficient caution to him for his future conduct. The deponent denied that before the fine

*306] was inflicted *he declined to hear the applicant and that the fine was imposed without an opportunity being given to him to show cause why it should not be inflicted.

Bovill and *Welsby* showed cause.—It is not contended that the order of the Court of Quarter Sessions is not subject to be examined in this Court. But whether the conduct of a person is a contempt of Court depends in many cases not merely on the expressions used, but on the manner and the tone of voice in which they are uttered, and on these the presiding Judge only can decide. In *Rex v. Davison*, 4 B. & A. 829 (E. C. L. R. vol. 6), which was an indictment for a blasphemous libel tried before Best, J., the Judge had fined the defendant for a contempt in the course of addressing the jury, and Bayley, J., said, p. 836, “that the Judge alone is competent to determine whether what is done, be or be not a contempt; and that neither this Court, nor any other co-ordinate Court, has a right to examine the question, whether his discretion, in that respect, was fitly and properly exercised.” And Holroyd, J., pp. 838–9, “The law arms him with an authority to fine and imprison a person for so doing,” i. e. committing a contempt of Court, “and makes it incumbent on the Judge so to act.” [They also referred to the case of *Carus Wilson*, 7 Q. B. 984 (E. C. L. R. vol. 53).] In *Ex parte Fernandez*, 10 C. B. N. S. 3 (E. C. L. R. vol. 100), Erle, C. J., said, p. 6, “It is the undoubted right of a superior Court to commit for contempt; and there is no necessity to specify the particular matter which constitutes the contempt: *The Case of The Sheriff of Middlesex*, 11 A. & E. 273 (E. C. L. R. vol. 39), 8 Dowl. P. C. 451 (nom. *Reg. v. Evans and Wheelton*). We could not sit in review upon the grounds on which the Judge of assize acted.”

*307] **Denman*, *McMahon* and *Kenealy*, in support of the rule.—The power of punishing for contempt proceeds on the necessity of preventing interruption of the business of the Court or insult being offered to the Judge or its officers. In the present instance the expressions which have been treated as a contempt were uttered by the applicant in the discharge of his duty to his client, and were called for by the improper interference of the foreman of the jury. There have been instances in which eminent counsel have retired from the conduct of a case on account either of observations made by the Judge, before the jury were sworn but in their hearing, calculated to prejudge the case, *Goldicut v. Beagin*, 11 Jur. 544, or of improper interruption by a juror; (a) and a new trial has been subsequently granted. In *Bushell's Case*, Vaugh. 185, the jurors who had been fined and committed for contempt were discharged by the Court. [BLACKBURN, J.—In that case it was held that a juror could not be guilty of contempt in delivering a verdict.] This Court will take into consideration all the facts in order to see whether the imposition of the fine was proper: *Burdett v. Abbot*, 14 East 1, cited in the case of *The Sheriff of Middlesex*, 11 A. & E. 273, 289, 294 (E. C. L. R. vol. 39). The conduct of the applicant is not within the definition of contempt of Court given in *The Practical Register in Chancery*, p. 99, cited in *Rex v. Clement*, 4 B. & A. 218, 221 (E. C. L. R. vol. 6):—“Contempt is a disobedience of the Court, or an opposing or despising the authority, justice, or dignity

(a) *Irwin v. Lever*, reported on another point, 2 F. & F. 296.

thereof: it commonly consists in a party doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of *the Court." [COCKBURN, C. J.— [*308 That is said of contempt of the Court of Chancery. BLACKBURN, J.—The present is a more narrow branch of contempt, namely, interrupting the business of the Court.] Counsel are privileged, for the sake of their clients and the public, to use great freedom of speech towards the presiding Judge, in the lawful defence of their clients, *e. g.*, Erskine, in *Rex v. The Dean of St. Asaph*, related and commended in Lord Campbell's *Lives of the Lord Chancellors*, vol. 6, p. 482–8. [They also cited *Hodgson v. Scarlett*, 1 B. & A. 232; *s. c.* Holt, N. P. C. 621 (E. C. L. R. vol. 3).]

COCKBURN, C. J.—I am of opinion that this rule must be discharged. The Quarter Sessions being a Court of record, has attached to its jurisdiction, as inherent in it, the power to punish for contempt. But as it is a Court of inferior jurisdiction, this Court has authority to intervene and prevent any usurpation of jurisdiction by it; and if it treats conduct as a contempt which there is no reasonable ground for so treating, this Court may interfere to protect the party upon whom the power to commit or fine for contempt has been improperly exercised. The question then arises whether, in the present instance, this jurisdiction of the Court of Quarter Sessions has been improperly exercised without sufficient ground or warrant.

We must not take upon ourselves the functions of a Court of Appeal; all we have to see is, whether the Quarter Sessions had jurisdiction in the matter complained of. The doctrine is laid down by Lord Denman in the case of *Carus Wilson*, 7 Q. B. 984 (E. C. L. R. vol. 58), in which a writ of habeas corpus was sent to the Island of Jersey in consequence of the applicant having been committed for contempt by the Royal Court of that Island; and the *question was whether he had [*309 committed a contempt. Lord Denman said, p. 1014, "I profess to decide this case upon what I find returned as the practice of the Royal Court. We give full credit to that Court for knowing and administering their own law. We find the party sent to prison in consequence of a supposed contravention of the law by which those who show want of respect to the Bailiff are to be sent to prison till they have asked pardon and have paid the fine imposed. Had anything positively absurd and unjust appeared, we might have acted as repeatedly has been done in cases where we have seen that the Colonial Courts have pronounced judgment against a party who had no opportunity of making his defence. But here it appears that a contempt was supposed to have been committed. That is a case in which it becomes the unfortunate duty of a Court to act as both party and Judge, and to decide whether it has been treated with contempt. We cannot decide upon the face of this return that they have come to a wrong conclusion. A Court may be insulted by the most innocent words, uttered in a peculiar manner and tone. The words here might or might not be contemptuous, according to the manner in which they were spoken: and that is what we must look to. If the words might be contemptuously spoken, that was an ample occasion for the decision of the Royal Court with which no other Court can meddle. Every Court in such a case has to form its own judgment. We must always feel most unwilling to interfere in this

way: indeed the practice has almost been discontinued for a century; as there is no Judge who would not be extremely grieved at finding himself compelled to exert the power. As to the question whether it sufficiently appears for what pardon is to be asked, I agree that it is *310] shown to be for want of *respect. The Court had adjudged the fact of want of respect, and had a right to order reparation; having called for it, the law left them no choice as to the mode in which they were to enforce their demand." It is plain that Lord Denman there took the same view which throughout the discussion it appeared to me we are bound to take. We are to see whether there is evidence upon which the Court of Quarter Sessions could reasonably come to the conclusion that a contempt had been committed; we are not to try the effect of the evidence and determine whether their decision was right or wrong.

It appears that Mr. Pater was fined for uttering certain words in his address to the jury. I agree that in themselves they are words which counsel might have uttered in the honest discharge of his duty for the purpose of vindicating the interests of his client and preventing the other jurors from being prejudiced or unduly influenced by the opinion of the foreman; and if they had been so uttered, though they were harsh and offensive to the jurymen to whom they were applied, that would be within the right and privilege of counsel. But if they were uttered with the intention to insult the jurymen, then they were an abuse of the privilege of counsel, and the Judge might treat the uttering of them as a contempt and punish it accordingly. We have now before us Mr. Pater's denial on oath that he used these words as a contempt of Court; and I give entire credit to what he states in his affidavit; but unfortunately, when he found that the Judge put an unfavourable construction on his language, instead of explaining himself he persisted in the words, and I think he must be taken to have persisted in them in the sense which Mr. Payne had put upon them. There had been *311] *altercation of an unpleasant nature between Mr. Pater and the foreman of the jury, and I regret that a juror was allowed to make the observations which the foreman made without the interference of the Court. It would have been more conducive to the upholding of the dignity of the Court that the learned Judge should have told the foreman that, if he had any observations to make, the proper course was to make them to himself and not to get into altercation with the counsel conducting the case. [After further comments upon the facts his Lordship proceeded:] Upon these facts can we say that the presiding Judge, Mr. Payne, with the assistance of Mr. Bodkin, came to a conclusion so unreasonable and wrong that the Court had not jurisdiction to impose a fine on Mr. Pater for contempt? I cannot say so. I believe I should be the last man to abridge the rights and privileges of members of the bar, which are given to them for the sake of suitors in Courts of justice; but, on the other hand, we are bound to protect jurymen in the important duties which they have to discharge against indignity or insult. Under the circumstances of the present case, I regret much that I feel bound to come to the conclusion that we should not be justified in interfering.

BLACKBURN, J.—I am entirely of the same opinion. It is very important to bear in mind the distinction which my Lord has pointed

out between a Court of appeal and a Court of supervision over inferior tribunals. This Court has power to set right inferior Courts if they act beyond their jurisdiction. But if the inferior Court had before them reasonable evidence from which they could draw the conclusion that the facts which gave them jurisdiction existed, and they drew that conclusion, *we cannot say that we do not draw the same conclusion [*312 and reverse their judgment. I agree that when we are considering a question of contempt we ought to see whether the inferior Court had reasonable grounds for adjudging that a contempt had been committed; but we must bear in mind that the Court is the judge whether it has been treated with contempt, as Lord Denman said in the case of *Carus Wilson*, 7 Q. B. 984, 1015 (E. C. L. R. vol. 58); for, looking to the nature of contempt, it may consist in the peculiar manner and tone with which words are spoken.

Also I agree that we must see that the Court which fined for contempt had that power. Now the Quarter Sessions is a Court of record, and must, as incident to it, have power to treat as a contempt an unwarrantable obstruction of the administration of justice in the face of the Court, even although it be by counsel; and if counsel, under colour of addressing the jury, insults a jurymen, or the Court, I cannot doubt that it would be such an obstruction as would be a contempt; and justify a fine and committal if necessary. Seeing how wide the privilege of counsel is for the benefit of suitors and the public, it requires considerable evidence to make out that language, which would be within the privilege of counsel if used for the purpose of defending his client, was really used for the purpose of insulting a jurymen in revenge for a previous quarrel. Mr. Payne, however, drew that conclusion; and, for the reasons stated by the Lord Chief Justice, I think that enough appears from which he might reasonably do so.

MELLOR and SHEP, JJ., concurred.

Rule discharged.

*CRANE v. THE LONDON DOCK COMPANY.

April 28.

[*313

Sale.—Market overt.—Sample.

1. A sale by sample is not entitled to the privileges of a sale in market overt.
2. *Quære*, whether a purchase of goods made in a market, by a shopkeeper, of goods brought to his shop is so entitled?

INTERPLEADER issue to determine whether certain opium was the property of the plaintiff as against the defendants.

On the trial, before Cockburn, C. J., at the London Sittings after Trinity Term, 1863, it appeared that a large quantity of opium had been stolen from the defendants. The plaintiff carried on business in the city of London at two different places, namely, at Pudding Lane as a drug merchant, and in Love Lane as an oil and colour man. In July, 1862, one Richardson came to the former of these, offering some opium for sale, which the plaintiff, having seen a sample of, contracted to purchase, but no written contract was entered into. Some days later a carrier, employed by Richardson, brought the opium to Pudding Lane, and finding that place of business closed, the time being after the usual closing hour, took it to Love Lane, where business was carried on until

a later hour, and there delivered it. The plaintiff subsequently took the opium to his place of business at Pudding Lane, and, having weighed it, paid Richardson for it there.

The jury found that the opium was a portion of that which had been stolen from the defendants, but that it was purchased by the plaintiff *314] without knowledge of that circumstance, whereupon a verdict was entered for the defendants, with leave to move to enter a verdict for the plaintiff.

Bovill, in Michaelmas Term, 1863, obtained a rule nisi accordingly, on the ground that there had been no sale of the opium in market overt, so as to divest the defendants of their right of property in it.

This rule was argued April 21, 25, and 28, and judgment given on the latter day.

Giffard, *Poland* and *Murphy* showed cause.—First. Here was no sale in market overt, so as to divest the property in the goods out of the true owner and vest it in the purchaser. A sale is not entitled to that privilege unless completed in the market, and effected in a shop where goods of the same nature are usually sold, and unless the actual goods were exposed for sale there: *The Case of Market Overt*, 5 Co. 83 b, Moore 860 (nom. *L'Evesque de Worcester's Case*), Anon., Dy. 99 b, pl. 66, 2 Inst. 713, 4 Inst. 272, *The Bailiffs, &c., of Tewkesbury v. Diston*, 6 East 438, 451-2, per Lord Ellenborough. [They also cited *Wait v. Baker*, 2 Exch. 1. BLACKBURN, J., referred to *Startup v. MacDonald*, in error, 6 M. & G. 593 (E. C. L. R. vol. 46).] And the principle only applies where the shopkeeper is the seller, not where he is the purchaser of the goods, as here. The ordinary use of a shop is to sell, not to purchase, and the extending the privilege of market overt to a purchase by a shopkeeper in his shop is at variance with the principles on which the privilege is founded. *Lyons v. De Pass*, 11 A. & E. 326 (E. C. L. R. vol. 39), will be relied on by the other side as an *315] authority to the contrary, but the point was not raised there. *Where a wharfinger, with whom goods had been deposited, sold them at his wharf without the authority of the owner, it was held that this was not a sale in market overt, even in London: *Wilkinson v. King*, 2 Campb. 335. [BLACKBURN, J., referred to *Barker v. Reading*, W. Jones 163-4.]

Secondly, the sale here was by sample, which, although binding on the parties, was not a sale in a market at all. In order to constitute such the goods must be corporally present: *The Prior of Lantony's Case*, 12 Ed. 4, 8 B., pl. 22; *Moseley v. Pierson*, per Lord Kenyon and Grose, J., 4 T. R. 104, 107, 108; *The Bailiffs, &c., of Tewkesbury v. Bricknell*, 2 Taunt. 120; *Hill v. Smith*, in error, 4 Taunt. 520; *Wells v. Miles*, 4 B. & A. 559 (E. C. L. R. vol. 6).

Bovill, *Parry*, Serjt., and *Hannen*, in support of the rule.—First.—In the city of London, on every day except Sunday, a shop is market overt for commodities ordinarily put there for sale: *Com. Dig. Market* (E.), and *The Case of Market Overt*, 5 Co. 83 b. Any place that is market overt for the purpose of selling goods is equally so for the purpose of buying them: *Taylor v. Chambers*, Cro. Jac. 68, and *Lyons v. De Pass*, 11 A. & E. 326 (E. C. L. R. vol. 39). A market is a place for buying and selling: *Tomlin's Law Dictionary*, voc. "*Market*." The object of the law in establishing the rule which protects transactions in

market overt was to encourage trade by inspiring confidence in all persons to come and trade, and so keep the market replenished: 2 Inst. 713. It is on the same principle that the bonâ fide holder of a bill of exchange, who has taken it in the regular course of business, has a right to hold it, although wrongfully obtained in the first instance.

*Secondly. That this sale was effected by sample is immaterial. It is enough if the contract in all its parts takes place in market overt, though the goods be not present, provided they come into the market before it is over. If a farmer brings beasts to market, and a drover asks the price of one which is already sold, and the farmer says that he has another of the same kind coming to market, which the drover then agrees to take, if the beast arrives before the market is over, this would be a good sale in market overt, although no property passed until it came. Some of the dicta cited by the other side were irrelevant to the cases in which they are found. [*316]

Thirdly. The property here did not pass until the plaintiff took the opium back to Pudding Lane, which is market overt, and had weighed it and completed the contract. [They cited the language of Willes, J., in *Bannerman v. White*, 10 C. B. N. S. 844, 855 (E. C. L. R. vol. 100)].

COCKBURN, C. J.—This rule ought to be discharged. We must take it, on the facts found by the jury, that the opium, the subject-matter of these proceedings, belonged to the defendants, The London Dock Company, that it had been stolen from them, and was bought by the plaintiff without knowledge of that circumstance. Then the question is, has there been a sale in market overt so as to vest in the plaintiff the property in this opium, of which the defendants were the true owners; and that depends on the determination of these points, first, was the shop of the plaintiff in Pudding Lane, being within the city of London, market overt both for the purchase and sale of this opium; and, secondly, if so, was what took place there with respect to it a sale and purchase in *market overt? It is unnecessary to decide the first of these points, which presents a very important question. It is to be observed, in favour of the plaintiff, that several cases affecting the question of market overt have arisen where the sale was to a shopkeeper in his own shop, and in none of them was the present point started; which raises a presumption that the able Judges before whom those cases were brought, and the able counsel by whom they were argued, considered it not tenable. But, as I have already said, it is not necessary to decide that point here, for we must give judgment for the defendants on the other. [*317]

Every contract of sale involves two things. First. The bargain. Secondly. The transfer of the property. This latter may take place either upon delivery or after delivery. But I do not understand how it can be said that a sale of a given article takes place in market overt unless the thing to be sold is in the market overt during the whole of the time that the incidents which constitute the purchase and sale are going on. Now, here, the facts are these. The sale is a sale by sample. The seller comes to the shop of the buyer and shows a sample of opium; and the buyer agrees to purchase the opium if, when delivered, it corresponds with the sample. The inception of the contract, i. e., the bargain between the parties, is in the shop of the plaintiff, which for the

purpose of this case we must assume to be market overt; still the delivery does not take place there, but in another shop of the plaintiff, which is not market overt. It may be contended that the contract was not even then complete; that the property did not pass until the vendee had an opportunity of examining the opium delivered in order to see that it corresponded with the sample. Yet we have this undoubted fact, *318] that the delivery, so far as *the vendor is concerned, took place in Love Lane, which is not equivalent to market overt. For it cannot be contended with any show of reason that the plaintiff, having accepted in Love Lane the delivery which the vendor was bound to make, but taking the goods next morning to Pudding Lane for his own convenience, can be considered as conveying them there on behalf of the seller, thus making the delivery at Love Lane a constructive delivery at Pudding Lane. The purchaser might have taken the goods, examined and disposed of them, without taking them to Pudding Lane at all. Therefore, here is a delivery at Love Lane, and by delivering them there the seller completed his contract. It is, indeed, contended that the property did not pass until the final completion of the contract at Pudding Lane. But, in order to constitute a good sale in market overt so as to pass goods as against the original owner, the whole must have taken place in market overt. Look at the abuses that would arise from a contrary interpretation. Suppose a bargain for sale, made in the market, and the goods delivered out of it, and the vendee took them into market overt to see if they corresponded with the sample, could it be said that was a sale in market overt? Look to the origin of the law as to such sales. It arose at a time when there was much greater simplicity of practice between buyer and seller. The practice then was to buy in markets and fairs. Shops were very few in London, and persons whose goods were taken feloniously, would know to what place to resort in order to find them. I can, therefore, quite understand that the law in question was established for the protection of buyers, that, if a man did not pursue his goods to market where such goods were openly sold, *319] he ought not to interfere with the right of the honest and bonâ fide purchaser; but still the law gives him this protection, that the goods must be exposed for sale, and the whole transaction begun, continued, and completed so as to give an opportunity to the owner to pursue them. That is the view of very high authority. In *The Bailiffs, &c., of Tewkesbury v. Diston*, 6 East 438, Lord Ellenborough says, p. 451, "The policy of the law, which binds the property of another by sale in market overt, requires that every part of the transaction, as well the contract of sale as the delivery, shall take place in the open market; otherwise it shall not bind the property of third persons." And that such was the view of Lord Chief Justice Mansfield appears from *Hill v. Smith*, 4 Taunt. 520, where he says, p. 533, "All the doctrine of sales in market overt militates against any idea of a sale by sample; for a sale in market overt requires that the commodity should be openly sold and delivered in the market; and Lord Coke so says in his 5 Rep. 82,(a) and that every part, both of the treaty and completing of the sale, must be in the market overt;" and, although it is true that that dictum was not absolutely necessary to the decision of the point before the Court,

(a) An evident mistake for 83 &.

it is no small matter to have the concurrent opinion of two such Judges coinciding with the reason of the thing and the policy of the law.

BLACKBURN, J.—I agree that it is not necessary to decide the question whether this shop was market overt for the purpose of the *purchase* by the shopkeeper of goods brought there for sale. Perhaps the question in each case depends on the custom of the shop, or the usage of the trade carried on in it.

Then comes the question which it is necessary to *decide, [*320 namely, whether this was a sale in market overt. It is pretty clear that the privilege given by law to a sale in market overt, of binding property against the true owner, was originally given in consequence of its policy of encouraging markets and commerce,—I agree with the plaintiff's counsel so far. But I think that, for that purpose, the vendor must buy the goods under circumstances such as would induce him to think the sale a good sale in market overt;—namely, he must buy a thing which is openly exposed in market overt under such circumstances that he might say to himself no person but the owner would dare to expose them for sale here, and therefore I have a right to assume that the shopkeeper has a right to sell them. I think this principle runs through all the cases, that the goods must be corporally present and exposed in the market. It was so said in *The Case of Market Overt*, 5 Co. 83 b.; Moore 360, nom. *L'Evesque de Worcester's Case*. In *The Bailiffs, &c., of Tewkesbury v. Diston*, 6 East 438, there is also a dictum of Lord Ellenborough (not an irrelevant one) to that effect, and another in *Hill v. Smith*, 4 Taunt. 520, of Mansfield, C. J. The whole transaction, and not its mere inception, must take place there. If a man makes a contract of sale of goods which are not in market overt, and they are afterwards delivered there, that would not be within the privilege of market overt, as appears from what Lord Coke says in *The Case of Market Overt*, and also from the case of *Barker v. Reading*, W. Jones 163—4, and the language of Lord Ellenborough in *The Bailiffs, &c., of Tewkesbury v. Diston*; and I think it is the good sense of the matter. A case has been put by the plaintiff's counsel of a mere negotiation for a sale, and a binding contract afterwards *in market [*321 overt, and I agree with him that such a sale would be good, for the previous talk would go for nothing. But that is not the case here. In the Anon. Case in *Dyer*, 99 b., pl. 66, which has been referred to, the bargain was made out of the market, leave being reserved to the buyer until 12 o'clock next day to assent or dissent. He assented in open market, but it was held that the property did not pass, for his assent had relation back to the original transaction which had taken place out of the market.

In the present case the contract was to supply goods equal to sample. No property passed at the time, for the vendor might have supplied any goods agreeing with the sample. When the goods were afterwards delivered, then, in pursuance with the above case in *Dyer*, the delivery related back to the previous contract, and the acceptance of them by the defendant rendered that contract complete, as appears from the language of Holroyd, J., in *Rohde v. Thwaites*, 6 B. & C. 388, 393 (E. C. L. R. vol. 13), but that acceptance was out of market overt.

The plaintiff's counsel further contended that the property here did not pass by the delivery at Love Lane, but passed by what afterwards

took place in Pudding Lane. It is not necessary to decide that. The contract was to supply opium anywhere, and when the goods were delivered in Love Lane, they were not delivered in market overt, there was nothing in the contract requiring the defendants to take the goods elsewhere, and the taking them to Pudding Lane and doing with them what was done there was no part of a sale in market overt.

SHEE, J., concurring,

Rule discharged.

*322] *THE QUEEN v. T. J. ARNOLD, Esquire. May 5.

Baron and feme.—20 & 21 Vict. c. 85, s. 21.—*Divorce Court.*—*Discharging protection order.*—*Decease of magistrate.*

Under stat. 20 & 21 Vict. c. 85, s. 21, the application to discharge an order for the protection of a wife's property must be made to the magistrate by whom it was granted; or, *semble*, to the Court for Divorce and Matrimonial Causes.

In 1858 the wife of J. Sharpe, who had been deserted by her husband, obtained from a Metropolitan Police Magistrate an order under stat. 20 & 21 Vict. c. 85, s. 21, for the protection of her property. After the death of that magistrate the husband applied to another Metropolitan Police Magistrate to rescind the protection order, who refused to interfere on the ground that he had no jurisdiction as the order was not made by him. The husband then petitioned the Court for Divorce and Matrimonial Causes, but, the Judge Ordinary doubting his jurisdiction, a fresh application was then made to the magistrate, who again refused.

Pearce had obtained a rule calling on the magistrate and the wife to show cause why he should not hear and determine that application.

Prentice showed cause.—Stat. 20 & 21 Vict. c. 85, s. 21, enacts, "A wife deserted by her husband may at any time after such desertion, if resident within the Metropolitan District, apply to a police magistrate, or if resident in the country to justices in Petty Sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his *323] creditors, or any person *claiming under him; and such magistrate or justices or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a feme sole: Provided always, &c.; that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof," &c. On the true construction of this section no police magistrate or justices other than he or those who made the order can discharge it, although the Court for Divorce and Matrimonial Causes may. [BLACKBURN, J.—Unless that Court has the power no one can discharge the order, and there is clearly a casus omissus in the statute.]. [He was then stopped.]

Pearce, in support of the rule.—The power of rescinding a protection order is not restricted to the magistrate by whom it was granted. The words in stat. 20 & 21 Vict. c. 85, s. 21, “*by whom* such order was made,” are mere surplusage or at most only directory. The Metropolitan Police Act, 10 G. 4, c. 44, s. 4, and 2 & 3 Vict. c. 47, s. 75, show that in matters within the jurisdiction of the police magistrates of the Metropolis it is immaterial to which of them application is made; and by stat. 11 & 12 Vict. c. 43, s. 1, and c. 44, s. 3, a proceeding originated before one justice of the peace may be continued before another.

*COCKBURN, C. J.—The words of stat. 20 & 21 Vict. c. 85, s. 21, are conclusive that the party wishing to obtain the consent of a magistrate to discharge such an order as this must apply to the magistrate by whom it was made; and a case like the present, where that magistrate has died or resigned or been deprived of his office in the mean time, seems a *casus omnisus* in the Act. But the word “whom” in that section is not applicable to the Court for Divorce and Matrimonial Causes, to which accordingly the application may be made. The Legislature may have had a confidence in that Court, but had not equal confidence in police magistrates or justices at Petty Sessions. We are not however called on to go into this.

BLACKBURN and SHEK, JJ., concurring, Rule discharged.(a)

(a) The omission in stat. 20 & 21 Vict. c. 85, s. 21, disclosed by this case is now remedied by stat. 27 & 28 Vict. c. 44, which enacts, “Where under the provisions of sect. 21 of the said Act a wife deserted by her husband shall have obtained or shall hereafter obtain an order protecting her earnings and property from a police magistrate, or justices in Petty Sessions, or the Court for Divorce and Matrimonial Causes, as the case may be, the husband and any creditor or other person claiming under him may apply to the Court or to the magistrate or justices by whom such order was made for the discharge thereof as by the said Act authorized; and in case the said order shall have been made by a police magistrate and the said magistrate shall have died or been removed, or have become incapable of acting, then in every such case the husband or creditor, or such other person as aforesaid, may apply to the magistrate for the time being acting as the successor or in the place of the magistrate who made the order of protection, for the discharge of it, who shall have authority to make an order discharging the same; and an order for discharge of an order for protection may be applied for to and be granted by the Court, although the order for protection was not made by the Court, and an order for protection made at one Petty Sessions may be discharged by the justices of any later Petty Sessions, or by the Court.”

*THACKERAY v. WOOD. [May 30.] [*325]

Vendor and purchaser.—Qualified covenant for title.—Breach.

By deed dated the 9th September, 1861, reciting that the defendant had contracted with the plaintiff for the absolute sale to him of a messuage and hereditaments, and the inheritance thereof, free from all encumbrances, the defendant conveyed to the plaintiff and his heirs the messuage, &c., together with (*inter alia*) all lights, liberties, privileges, easements, profits, and appurtenances to the messuage, &c., belonging or in anywise appertaining, or usually held, occupied, or enjoyed therewith, or deemed or taken as part, parcel, or member thereof, or any part thereof, to the uses and upon the trusts therein mentioned; and the defendant covenanted that notwithstanding any act, deed, matter, or thing whatsoever made, done, or permitted to the contrary by the defendant or any person or persons claiming through, under, or in trust for him, he then had in himself good right and absolute authority by the deed to convey the messuage, &c., with their appurtenances. On the 22d June, 1842, the defendant, then being the owner in fee of the messuage, &c., by an agreement in writing with the owners in fee of an adjoining building, agreed that a certain cornice and certain spouts and pipes conducting the water into a spout belonging to the building, and the dripping of water from the eaves of the

messuage, and the three windows on the east side of the messuage overlooking the building, were encroachments by the defendant, and should and might be used by him so long only as the other parties to the agreement should consent thereto; and the defendant paid to the other parties 5s. as an acknowledgment, and agreed to pay 5s. per annum so long as the cornice, spouts, pipes, or windows should be used by him. At that time the defendant had not acquired any easement in respect of the cornice, spouts, pipes, or windows by the lapse of twenty years. The plaintiff, having been interfered with in the enjoyment of the easement by the owners of the adjoining building, brought an action against the defendant for breach of covenant. Held, that the defendant had conveyed the premises described so far as he possessed or could grant them; but that the covenant for title was limited to that which he actually had, or but for his own act would have had, and that the acknowledgment and payments were not an act within that covenant.

THE first count of the declaration stated that the defendant, by an indenture, bearing date the 9th September, 1861, made between the defendant of the first part, one James Sollory of the second part, the plaintiff of the third part, and one Francis Burton of the fourth part, and sealed with the seal of the defendant: After reciting that, by an indenture dated the 8th December, 1860, and made between the Rev. Philip Bainbrigge Maddock of the first part, the defendant of the second *326] part, and the said James Sollory *of the third part, the messuage, garden, hereditaments and premises thereafter and hereinafter mentioned were with the appurtenances granted and released unto the defendant, his heirs and assigns, to hold the same unto the defendant and his heirs, to such uses and for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as the defendant should by any deed or deeds, writing or writings, with or without power of revocation from time to time direct, limit or appoint; and in default of, and until such direction, limitation or appointment, and so far as any such should not extend, to the use of the defendant and his assigns during his life, with a limitation to the use of the said James Sollory, his executors and administrators during the life of the defendant, in trust for the defendant and his assigns during his life, with remainder to the use of the defendant, his heirs, appointees and assigns for ever: and also, after reciting that the defendant had contracted and agreed with the plaintiff for the absolute sale to him of the said messuage, garden, hereditaments and premises, and the inheritance thereof, in fee simple in possession, free from all encumbrances, for the price therein mentioned: *It was thereby witnessed* that, in pursuance and performance of the aforesaid contract, and in consideration of the sum of 3800*l.* to the defendant then paid by the plaintiff, he the defendant, pursuant to and by force and virtue and in exercise and execution of the power or authority to him given, limited or reserved in and by the said recited indenture of the 8th December, 1860, and of all and every other power and powers, authority and authorities whatsoever in anywise enabling him in that behalf, did *327] absolutely and irrevocably direct, *limit and appoint that the said messuage, garden, hereditaments and premises should thenceforth go, remain, continue and be, and that the said recited indenture of the 8th December, 1860, should thenceforth operate and enure, to the uses and upon the trusts thereafter expressed and declared of and concerning the same: *And it was* by the said first mentioned indenture *further witnessed* that, in further pursuance and performance of the aforesaid agreement, and for the consideration thereinbefore expressed, and also in consideration of the sum of 10*s.* sterling

to the said James Sollory in hand then paid by the plaintiff, the said James Sollory at the request and by the direction of the defendant did thereby release and convey, and the defendant did, by the said first mentioned indenture, grant, release, convey and confirm unto the plaintiff and his heirs the said messuage, garden, hereditaments and premises as in the said first mentioned indenture particularly mentioned and described, together with all and singular houses, outhouses, edifices, stables, walls, yards, gardens, ways, waters, watercourses, lights, liberties, privileges, easements, profits and appurtenances to the said messuage, garden, hereditaments and premises belonging or in anywise appertaining, or usually held, occupied or enjoyed therewith, or deemed or taken as part, parcel, or member thereof, or any part thereof: To have and to hold the said messuage, garden, hereditaments and premises, and all and singular other the said premises with their and every of their appurtenances unto the plaintiff and his heirs, to the uses and upon the trusts thereinbefore declared of and concerning the same. *And the defendant did thereby covenant, promise and agree* with the plaintiff, his heirs and assigns that the said recited *or referred- [*328 to power of appointment was at the time of the sealing and delivering of the said first mentioned indenture a good, valid and subsisting power, and not in anywise extinguished or made void or voidable; and that, notwithstanding any act, deed, matter or thing whatsoever made, done or permitted to the contrary by the defendant or any person or persons claiming through, under, or in trust for him, he the defendant then had in himself or in conjunction with the said James Sollory, good right and absolute authority by the said first mentioned indenture to appoint and also to grant, release and convey and assure the said messuage, garden, hereditaments and premises with their appurtenances, to the uses and in manner aforesaid according to the true intent and meaning of the said first mentioned indenture. Averment, that at the time of the making of the first mentioned indenture, by reason and means and in consequence of certain acts, deeds, matters and things theretofore made, done or permitted by the defendant, he the defendant had not at the time of the making of the first mentioned indenture in himself, nor in conjunction with James Sollory, good right or absolute authority by the first mentioned indenture to appoint or to grant, release or convey or assure the messuage, garden, hereditaments and premises with their appurtenances in manner aforesaid, to wit, certain lights, liberties, privileges, easements, profits and appurtenances then held, occupied and enjoyed with and deemed and taken as part, parcel and member of the messuage, garden, hereditaments and premises, or of some part thereof, contrary to the covenant in that behalf, whereby the messuage, garden, hereditaments and premises were of much less use and value to the *plaintiff than the same otherwise might [*329 and would be, and the plaintiff could not have or enjoy the supposed lights, liberties, privileges, easements, profits and appurtenances without the permission and license of certain other persons, and had been obliged to expend money for and in and about procuring their permission and license for his having and enjoying at their will the supposed lights, liberties, privileges, easements, profits and appurtenances.

There was a second count for fraudulent concealment and misrepre-

sentation by the defendant on the sale of the messuage, garden, hereditaments and premises mentioned in the first count.

Pleas. First. To the first count, denying the alleged breaches of covenant. Second. To the second count, Not guilty.

Issues thereon.

The action was tried before Blackburn, J., at the last Spring Assizes for the town and county of the town of Nottingham, when the following facts appeared.

The plaintiff put in, and proved, the deed of the 9th September, 1861, containing the covenant for the alleged breach of which the action was brought. The indenture of the 8th December, 1860, recited in that deed was, in fact, a reconveyance by a mortgagee of the messuage, house, garden, hereditaments and premises in question to the defendant, who had been owner of the premises for many years. While the defendant was such owner, and previous to the making of the agreement after mentioned, the defendant had taken down the greater part of an old dwelling-house and rebuilt it so as to make a much larger house, and in doing so had made a certain cornice forming part of his house, and *380] which *projected over certain adjoining property, and also made certain spouts and pipes conducting the water into a spout belonging to the adjoining property, and certain eaves drip from the roof of the defendant's premises upon the adjoining premises, and the defendant also made and opened out the three windows in his dwelling-house overlooking the adjoining property, and the defendant had not, at the time of the making of the agreement, acquired any easement or right with respect to any of these encroachments.

On the 22d June, 1842, by an agreement in writing made between the defendant, then being and therein described as the owner in fee of the house, garden and premises, and certain persons therein named and described as the tenants in fee of a certain building used as a dissenting chapel, being the same premises adjoining the messuage, house, garden, hereditaments and premises of the defendant: It was expressly declared and agreed by and between the parties thereto that the cornice, spouts, and pipes conducting the water into a spout belonging to the chapel, and the dripping of water from the eaves of the messuage, and the three windows on the east side of the messuage or dwelling-house of the defendant, overlooking the chapel, were encroachments by the defendant, and should and might be used by him so long only as the other parties to the agreement should consent thereto, and that the usage and enjoyment thereof, or either of them, for any length of time thereafter by the defendant, should not give him or any other person any right thereto; and the defendant, in confirmation thereof, paid to the other parties to the agreement the sum of 5s. as an acknowledgment to prevent any such *381] right being acquired, and thereby agreed *to pay 5s. per annum so long as the cornice, spouts, windows, &c., or any or either of them should be used by him.

After the making of the agreement and down to the time of the plaintiff's purchase, the defendant had regularly paid the acknowledgment mentioned in it.

At the time, and before the plaintiff purchased the house, garden and premises, he observed the cornice, spouts, and windows in question, but was entirely ignorant of the fact that they were encroachments on the

adjoining property, nor was any information given to him or his solicitor by the defendant or his solicitor as to the agreement, or as to their being encroachments. It was admitted, however, at the trial that such information was not wilfully or deceitfully withheld.

Some time after the completion of the purchase the plaintiff was applied to by a Mr. McCraith, the then owner of the adjoining property, for the payment of the acknowledgment of 5s. mentioned in the agreement of the 22d June, 1842, which was the first information the plaintiff or his solicitor received on the subject, but the plaintiff refused to pay the same. Subsequently an action was brought by Mr. McCraith against the plaintiff in respect of some of the said encroachments, and afterwards, the plaintiff being advised that he had no defence to the same, suffered judgment by default, and was compelled to pay 17l. 8s. 8d., being the damages and taxed costs in the action, and was obliged to enter into a new agreement for the payment of 1s. yearly for the further enjoyment of the cornice and spouts and windows during the sufferance and permission of Mr. McCraith, who gave evidence at the trial of his intention to build on the adjoining premises at some future time, and *thereby put an end to any further enjoyment of the windows, [*332 spouts, &c.

After evidence had been given on both sides as to the amount by which the plaintiff's premises were deteriorated in value by the loss of the right of the windows, spouts, &c., the learned Judge submitted to the jury the fact of the injury and the amount of damage sustained, reserving for the opinion of the Court the question whether any breach of the covenant declared upon had, under the circumstances, been committed by the defendant. The jury found the fact of injury, and assessed the damages at 100l. On the second count the verdict was entered for the defendant.

In Easter Term, *Field* obtained a rule nisi to enter a verdict for the defendant on the first count, pursuant to leave reserved, on the ground that there had been no breach of the covenant declared upon in reference to the cornice and lights in question.

The rule was argued at the Sittings in banc after Eastern Term, May 11, before BLACKBURN, MELLOR and SHEK, JJ.

Macaulay, *Hayes*, Serjt., and *Bruce Campbell* showed cause.—First. The defendant conveyed to the plaintiff the right to the three windows and the cornice, spouts and pipe which were apparently belonging to the house. The word "lights" passes the right to the windows and the access of light and air through them.

Secondly. The defendant was guilty of a breach of the covenant declared upon, inasmuch as but for the written acknowledgment which he made, and the payments under it, the right to the windows and the cornice, spouts and pipes would have become indefeasible by the lapse *of twenty years. The covenant is in the most general terms, [*338 and extends to every act, deed, matter or thing made, done or permitted by him, by which his title to convey in fee may be affected. Here the defendant by his acknowledgment and payments has estopped himself and those claiming under him from setting up a title which, but for that acknowledgment and those payments, might have been acquired. He became tenant at will of the easement in question by his own act. There is no authority bearing on this question. *Hobson v. Middleton*, 6 B. & C. 295 (E. C. L. R. vol. 13), is not in point, and only shows that

assenting to an act which a man cannot prevent is no breach of covenant. [SHRE, J., referred to *Spenser v. Marriot*, 1 B. & C. 457 (E. C. L. R. vol. 8).]

Field and Cave, contra.—First. By the deed of the 9th December, 1861, the defendant conveyed only those easements which he had a right to convey. According to the practice of conveyancing an abstract of the vendor's title is first furnished to the purchaser. [MELLOR, J.—Would there be an inquiry by the purchaser whether the windows were ancient, or whether there had been any acknowledgment that they were enjoyed of right?] It is for the purchaser when he gets the abstract to ascertain whether the vendor ever had that which he purports to convey. When a power of appointment or other document necessary to complete the vendor's title has not been properly executed, the loss falls on the purchaser. A mortgagor covenants absolutely; but the covenant for breach of which this action is brought is one of the ordinary covenants for many years introduced into purchase deeds. There is no relief from encumbrances prior to the vendor's title. In *Sugd. Vend. and* *384] *Purch.*, vol. 2, ch. xii. *s. 2, clause 6, p. 420, 10th ed.; ch. xiii. s. 2, clause 6, p. 549, 14th ed., it is said "If the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law, or in equity." In this deed the parcels consist of two parts. First, the specific subject, viz., the messuage, garden, hereditaments and premises; second, a general clause—"together with all and singular houses, &c.," expanded into a catalogue of words, among which is "lights." Supposing that word means a right to unobstructed access to air and light through particular apertures in the house, still it is not an indefeasible right, but qualified by the words following. It is admitted that there is no such right "belonging or in anywise appertaining" to the house. The words "or usually held, occupied, or enjoined therewith," are apt words to recreate an easement which has been extinguished by unity of ownership, but they have no other operation. [They cited *Plant v. James*, in error, 4 A. & E. 749 (E. C. L. R. vol. 31), *Barlow v. Rhodes*, 1 Cr. & M. 439, 448, per Bayley, B.] Then follow the words "or deemed or taken as part, parcel or member thereof, or any part thereof," which point to the out-houses rather than to easements: an easement cannot be said to be part of the house. In the case of the sale of large property it would be very inconvenient to adopt the construction contended for by the plaintiff; and the only remedy would be by specifying in a schedule the easements intended to be conveyed. Where the owner of two properties, A. and B., conveys B. to a purchaser without any reservation, he discharges it from any burden imposed upon it, or any easement enjoyed over it at *335] the *time of the conveyance in respect of A., and if he afterwards sells A. the purchaser of A. would have no right against the prior purchaser of B.

Secondly. The covenants in a deed of conveyance are to be read with reference to the qualification of them appearing on the face of the deed, and do not extend to an act of the defendant which was not in derogation or destruction of any right which he had acquired, but the effect of which was only the non-acquisition of a right. In *Browning v. Wright*, 2 B. & P. 13, Lord Eldon said, p. 22, "It is certainly true, that the words of a covenant are to be taken most strongly against the

covenantor; but that must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument." [BLACKBURN, J.—In *Woodhouse v. Jenkins*, 9 Bing. 431, 440 (E. C. L. R. vol. 23); *Tindal, C. J.*, cites the case of *Butler v. Lady Swinnerton*, Cro. Jac. 656,(a) in which Sir John Swinnerton purchased an estate and procured the conveyance of it to be made to himself and his wife, and to the heirs of himself, and then made a lease in which he covenanted for quiet enjoyment by the lessee against the disturbance of himself, or of any other person by or through his means, title or procurement; and after his death, his wife having evicted the lessee, it was held that the wife was a person within the covenant, who claimed by the means of her husband. The covenant for quiet enjoyment is as much qualified as this covenant.] The action on this covenant is never applied to the absence of a right to convey an easement. The owner of the servient tenement did not evict the plaintiff under the agreement signed by the defendant, but on the strength of his own title paramount only. If the *defendant having had [*336 a grant of the right from the owner of the servient tenement had regranting it to him, that might have been an act within the covenant.

Cur. adv. vult.

MELLOR, J., now delivered the judgment of the Court.—In this case the question turns upon the true construction of a covenant, contained in a deed of conveyance by the defendant to the plaintiff of a certain house, garden and premises in Nottingham, whereby the defendant covenanted with the plaintiff that *notwithstanding any act, deed, matter or thing whatsoever made, done, or permitted to the contrary by the defendant, or any person or persons claiming through, under or in trust for him, he the defendant then had in himself, or in conjunction with one James Sollory, good right and absolute authority by the deed to appoint, and also to grant, release and convey and assure the said messuage, garden, hereditaments, and premises, thereinbefore described and thereby appointed and granted and released or intended so to be, with the appurtenances, to the uses and in manner aforesaid, according to the true intent and meaning of the deed.*

It appeared on the trial, before my brother Blackburn, that the deed in question was dated the 9th September, 1861, and was made between the defendant of the first part, one James Sollory of the second part, the plaintiff of the third part, and one Francis Barton of the fourth part, and that, after reciting that by an indenture bearing date the 8th December, 1860, the said messuage, burgage or tenement and garden and hereditaments were conveyed to the defendant and his heirs, to such uses as he should appoint, and in default thereof to the use of the defendant and his assigns during *his life, with remainder to James Sollory, his [*337 executors, &c., in trust for the defendant and his assigns during his life, with remainder to the defendant, his heirs, appointees and assigns, for ever: And also reciting that the defendant had contracted with the plaintiff for the absolute sale to him of the said messuage, burgage, or tenement and hereditaments thereafter described, and the inheritance thereof, free from all encumbrances, for the price of 3800*l.*: It was witnessed that, in consideration of that sum paid by the plaintiff to the defendant, he the defendant, in exercise of the power to him given

(a) More fully reported in *Palm.* 339, and 2 *Roll.* 286.

by the therein recited deed, did in the usual manner appoint that the said messuage, burgage or tenement, and all other the hereditaments thereafter particularly described, with their and every of their appurtenances, should enure to the uses thereafter declared concerning the same. And it was further witnessed that in further performance of the agreement, and for the consideration aforesaid, James Sollory and the defendant did thereby respectively release and convey, and grant, release, convey and confirm, to the plaintiff and his heirs, the messuage, burgage or tenement and garden therein particularly described, together with (inter alia) all lights, liberties, privileges, easements, profits and appurtenances to the said messuage, garden, hereditaments and premises belonging, or in any wise appertaining or usually enjoyed therewith, or deemed or taken as part, parcel or member thereof, or any part thereof; To the uses therein mentioned. The defendant covenanted that the said power of appointment was then a subsisting power; and then followed the covenant above set out upon the construction of which the question in this case turns.

*338] *It appeared that the recited indenture of the 8th December, 1860, was, in fact, a reconveyance by a mortgagee to the defendant of the premises in question. And that, on the 22d June, 1842, the defendant then being the owner in fee of the messuage and premises, by an agreement in writing made with certain persons therein named and described as the tenants in fee of a certain building used as a dissenting chapel, agreed that a certain cornice and certain spouts and pipes conducting the water into a spout belonging to the chapel, and the dripping of water from the eaves of the messuage, and the three windows on the east side of the messuage belonging to the defendant overlooking the chapel were encroachments by the defendant; and should and might be used by him so long only as the other parties to the agreement should consent thereto, and that the usage and enjoyment thereof or of either of them for any length of time thereafter by the defendant should not give him or any other person any right thereto. And the defendant in confirmation thereof paid to the other parties to the agreement the sum of 5s. as an acknowledgment to prevent any such right being acquired, and thereby agreed to pay 5s. per annum so long as the cornice, spouts, windows, &c., or any or either of them, should be used by him. At the time the agreement was so made the defendant had not acquired any easement in respect of the cornice, spouts, pipes, or windows, by the lapse of twenty years; and the owners of the chapel could then have lawfully obstructed the windows and prevented the acquisition of any easement in respect thereof and would probably have done so had not the defendant entered into the agreement and paid the acknowledgment.

*339] *There was also a count for deceit, but at the trial it was admitted that though, on the negotiation for the purchase of the messuage, garden, and premises by the plaintiff, no mention was made by the defendant or his agents of the fact of his having entered into the said agreement or paid the said acknowledgment, yet such information was not wilfully or deceitfully withheld. The verdict therefore was directed for the defendant upon that count.

The learned Judge submitted to the jury the fact of the injury and the amount of damage, reserving for the opinion of the Court the ques-

tion whether any breach of the covenant had under the circumstances been committed by the defendant. The jury found the fact of injury, and assessed the damage at 100%.

There are no cases directly bearing upon the point, but after consideration we have come to the conclusion that there was no breach of the covenant in question committed by the defendant, and that he is therefore entitled to have the verdict entered for him.

It appears to us that the defendant, by the conveyance, conveyed all the premises described so far as he possessed or could grant them, but that, by the qualified covenant for title, he limited his warranty of title to that which he actually had or, but for his own act, would have had. In the words of Lord Eldon, in *Browning v. Wright*, 2 B. & P. 13, p. 22, "If a man purchase an estate of inheritance and afterwards sell it, it is to be understood *prima facie* that he sells the estate as he received it: and the purchaser takes the premises granted by him with covenants against his acts. In fact, he says, I sell this land in the same plight that I received it, and *not in any degree made worse by me." And it was said by Buller, J., in the same case, p. 26, [*340 that these covenants were introduced "for the protection of the party conveying," "for the purpose of qualifying the general warranty which the old common law implied." On examining the words of the covenant in question, we find them to be "that, notwithstanding any act, deed, matter or thing whatsoever made, done or permitted to the contrary by the defendant or any person or persons claiming through, under, or in trust for him, &c." Now, the word "acts," as was said by the Court in *Spenser v. Marriott*, 1 B. & C. 457, 459 (E. C. L. R. vol. 8), "means something done by the person against whose acts the covenant is made, and the word 'means' has a similar meaning, something proceeding from the person covenanting." What act, deed, or thing has the defendant made, done, or permitted to the contrary of his right and absolute authority to convey all that was ever conveyed to him or that he was ever entitled to convey? In the words of Lord Eldon, what has he done to prejudice the plight in which he received the estate? And in what degree has it been made worse by him? He never had acquired an easement in such windows, and how then can he have derogated in any manner from the estate which he ever possessed by an agreement or acknowledgment the effect of which was simply to keep things in statu quo and to prevent the owners of the chapel from taking effectual measures to prevent the possibility of his ever acquiring by their acquiescence an absolute right to the particular access of light and air through the windows in question. No case has been cited to show that such a covenant means more than a warranty against acts done by the [*341 *party who may have encumbered or "made worse" his estate; and we are therefore led to the conclusion that no breach of warranty was in this case committed, although we are not insensible to the hardship which has, under the circumstances, been inflicted upon the plaintiff.

Rule absolute.(a)

(a) An appeal is pending.

EX PARTE DUNCAN. April 28.

Articled clerk.—Service.—Supervision and control of master.

1. Although in order to constitute good service of an articled clerk under stat. 6 & 7 Vict. c. 73, s. 12, supervision and control of the master during the time of service is requisite, this must be understood in a relative, not an absolute sense.

2. A clerk having been a managing clerk for several years previous to entering into articles, and also being a person of mature age, renders the control and supervision of his master less necessary than in the case of a young man just entering on the profession.

IN Hilary Term,

The Solicitor-General had obtained a rule, calling on the Examiners appointed by the Courts to examine persons under articles of clerkship applying to be examined at intermediate examinations, to show cause why they should not certify to having examined one Henry Thomas Duncan, as required by the rules made in January, 1863, pursuant to stat. 23 & 24 Vict. c. 127, s. 9.

Mr. Duncan had been examined, but the Examiners objected to his *service* as insufficient. Affidavits were used on showing cause, and the statements on both sides disclosed a somewhat complicated state of facts.

*342] *Garth* showed cause, and referred to two unreported *cases in this Court of Jeremiah Smith in May, 1843, and Alfred T. Mills in May, 1862.

The Solicitor-General and *T. F. Chitty*, in support of the rule.

The Court (COCKBURN, C. J., BLACKBURN, MELLOR and SHEE, JJ.) said that in order to constitute good service under articles, as required by stat. 6 & 7 Vict. c. 73, s. 12, supervision and control of the master during the time of service was requisite. But this must be understood in a relative, not an absolute sense; and the circumstance of the clerk having been a managing clerk for several years previous to entering into articles, and as such familiar with the rules necessary for the honourable conduct of his profession, and also being a person of mature age, would render the control and supervision of his master less necessary as a matter of discipline than in the case of a young man just entering on the profession. A merely colorable service would not however be sufficient: and, without desiring that the facts of the present case should be drawn into a precedent, the rule might be made absolute.

Rule absolute.

END OF EASTER TERM.

EASTER VACATION, 27 VICT. 1864.

HAWKINS and Another v. COULTHURST. *May 10.*

Life policy.—Assignment.—Forfeiture.—Damages.

A deed by which the defendant assigned a policy of insurance on his life for 1000*l.* to trustees for his creditors, contained a covenant that he would not do any act or thing by which the policy should be forfeited. The policy was subject to a condition that if the assured should go beyond the limits of Europe without license from the directors the policy should be void. In an action for a breach of covenant in that the defendant went beyond the limits of Europe without license from the directors: Held, that the measure of damages was the present value of the policy to be assessed by an actuary, taking into consideration the fact that the defendant covenanted to pay and should pay premiums on the policy.

THE declaration stated that by deed bearing date the 7th May, 1856, after reciting that the defendant had by policy of insurance dated the 20th March, 1856, effected an insurance on his life in The United Kingdom Assurance Society for the sum of 1000*l.* subject to the annual premium of 20*l.* 2*s.* 6*d.*, and that the defendant was indebted to the several persons named in the schedule thereto in the amounts set opposite to their respective names, and that the defendant had agreed to assign the policy and all moneys secured and receivable thereon to the plaintiffs upon the trusts thereafter contained for securing the payment of the debts with interest, the defendant assigned to the plaintiffs the policy of assurance and the full benefit and advantage thereof, and of all and every sum of money that should become due or *be recoverable [*344 upon or by virtue of it, and all the right, title, interest, property, benefit, claim and demand whatsoever both at law and in equity of him the defendant in, to or out of the same: To have, receive and take the policy, sum and sums of money and premises unto the plaintiffs, their executors, administrators and assigns. In trust nevertheless as a pledge or security for the payment of the several debts mentioned in the schedule, with interest after the rate of 5*l.* per cent. per annum. The deed contained a covenant that the defendant had not at any time theretofore made, done, executed or suffered, and should not nor would at any time thereafter make, do, execute or suffer, any act, deed, matter or thing whatsoever by means whereof the policy of assurance thereby assigned or intended so to be was, could, should or might be impeached, charged, avoided, forfeited, vacated or encumbered, or by means whereof the plaintiffs should or might be hindered or prevented from recovering or receiving the sum or sums recoverable or to be recovered thereupon or by virtue thereof; and that he would during the continuance of the security regularly pay the premiums and do all other things necessary to be paid and done for keeping the policy of insurance on foot, and would in all things conform to the rules of The United Kingdom Assurance Society so far as related to the policy to the intent that the same might be preserved in full force; and would, within seven days after the premiums should become due, deliver the receipt for the same to the plaintiffs; and further that in case he should neglect to pay the annual sum payable in respect of the policy for keeping the same on foot, or to deliver to the plaintiffs the receipt for the premium, it should be

*345] *lawful for the plaintiffs to advance and pay such annual sum, and he would, on demand, repay such sum to them with interest. Averment. That the policy of assurance was made subject to and under the condition or proviso, amongst others, that is to say, that in case the assured should go beyond the limits of Europe without previous license from the Board of Directors of the Assurance Company for that purpose the policy should be null and void, and all moneys paid by or on behalf of the assured on account of the insurance should be forfeited. Breaches. First and second. That the defendant neglected to pay the annual premiums, or deliver to the plaintiffs within seven days after the premiums became due the receipts for the same; and thereupon the plaintiffs, for the purpose of keeping the policy on foot, paid to The United Kingdom Assurance Society such annual sums of money; and although, &c., the defendant had not repaid the same to the plaintiffs. Third. That the defendant went beyond the limits of Europe, to wit, to the colony of Canada East, without previous license from the Board of Directors of The United Kingdom Assurance Society for that purpose. Whereby and by reason of the premises the policy of assurance became and was vacated, and became and was null and void, and the plaintiffs lost the benefit and security of the policy for the payment of the premiums and sums of money paid and advanced by them, and the policy became wholly lost as a security to the creditors for the payment of their several debts.

First plea. That the deed was not the defendant's deed.

Issue thereon.

On the trial before Shee, J., at the Sittings in London after Hilary Term, a verdict was entered for the plaintiff *for 150*l.* 17*s.* on *346] the first breach, 1*s.* on the second, and 1*s.* on the third; with liberty to the plaintiffs to move to increase the damages on the last breach to 1000*l.* or such other sum as the Court might direct.

In Easter Term, a rule accordingly was obtained.

H. James showed cause.—The proper measure of damages is the present value of the policy to be ascertained by deducting from the full amount assured, the sums which would be estimated as payable by way of premiums, if the policy had not lapsed, according to the average duration of human life.

R. A. Fisher (*Huddleston* with him), in support of the rule.—The security having been destroyed by the voluntary and wrongful act of the assured, the trustees of the creditors are entitled to the 1000*l.* [CROMPTON, J.—You contend that the trustees are entitled to the 1000*l.* twenty years, it may be, before it is due. BLACKBURN, J.—Suppose a policy subject to a condition that if the assured die upon the seas it should be void, as in *Dormay v. Borradaile*, 5 C. B. 380 (E. C. L. R. vol. 57), and the assured had so died.] If this policy were in force the trustees might, by the death of the assured, be entitled to the 1000*l.* immediately; and where the defendant may be regarded in the light of a wrongdoer in breaking his contract, the damages are to be assessed on the highest principle. In *Chitty on Contracts*, p. 793, 7th ed., by Russell, cited in *Mayne on the Law of Damages*, p. 10, it is said that in such cases “a greater latitude is allowed to the jury in assessing the *347] damages;” as in an action on a bond *to resign a living: Lord

Sondes v. Fletcher, 5 B. & A. 835 (E. C. L. R. vol. 7). The

present is analogous to an action for destroying or detaining title deeds, in which the plaintiff recovers the whole value of the land.^(a) [CROMPTON, J.—In the latter case, large damages are given in order to constrain the defendant to give up the title deeds. MELLOR, J.—The present is more like an action upon the breach of a contract for the purchase of a reversion.]

PER CURIAM (CROMPTON, BLACKBURN, MELLOR and SHRE, JJ.).

Rule absolute in the following terms:—

“It is ordered that the damages given on the verdict obtained in this cause on the third breach be increased by the same being assessed on the present value of the policy, taking into consideration the fact that the defendant covenanted to pay and should pay premiums on the policy, and that such damages be assessed by an actuary to be agreed on between the attorneys for both parties,” &c.

(a) See *Robertson v. Dumaresq*, 2 Moo. P. C. C. N. S. 66, 95.

*IN THE EXCHEQUER CHAMBER. [*348

OPPENHEIM and Others v. FRY. May 12.

Marine insurance.—General and particular average.—Common 3 per cent. memorandum.—Steamer.—Hull and machinery separately valued.

In a policy of insurance upon a steamer, in the ordinary form, the hull and the machinery were separately valued, with a clause, “average on the whole or on each as if separately insured.” The steamer had discharged her cargo at C., and while she lay there without any cargo on board, her hull was damaged by fire. The costs of repairs to the hull amounted, after a deduction of the usual one-third, to 386*l.* 12*s.* 6*d.*, including the sum of 9*l.* 0*s.* 1*d.* for Lloyd’s surveyors’ fees. An additional sum of 55*l.* 5*s.* 10*d.* was expended in extinguishing the fire. It was proposed to add this to the other sum, so as to take the case out of the common 3 per cent. memorandum. In an action for particular average on the hull: held, affirming the judgment of the Queen’s Bench, that these expenses must be apportioned to the hull and machinery according to their respective values, and that only the sum due for the hull could be added to the direct loss on the hull.

THE Court below having discharged a rule to enter a verdict for the plaintiffs (see 3 B. & S. 873), the plaintiffs appealed.

MacLachlan (*Lush* with him), for the plaintiffs.—The plaintiffs are not bound by the average statement, though made by average-staters employed by them. The question is, whether the sum of 55*l.* 5*s.* 10*d.*, which was expended for labourers, pumps and other assistance in extinguishing the fire, is general or particular average within the common memorandum in this policy of insurance. The Court below apportioned that sum between the hull and the machinery, because it was expended to save the latter from any damage as well as the former from further damage; but this is a case of particular average, and therefore by the special clause in the policy that sum must be appropriated to the hull only.

*First. General average is impossible in an empty ship. [*349 Though the parties have contracted that for a particular purpose the hull and the machinery shall be regarded as two subjects, there is only one subject of insurance; and the case is the same as if there were two policies upon the same subject. General average must be based on

a plurality of subjects of insurance. *Lege Rhodiæ cavetur, ut si levandæ navis gratiâ jactus mercium factus est; omnium contributione sarcitur, quod pro omnibus datum est.* Dig. lib. xiv., tit. 2. In 2 Arnould on Insurance, p. 895, ch. iv., s. 1, § 327, 2d ed., a general average loss is defined to be "a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the joint benefit of ship and cargo," citing Lawrence, J., in *Birkley v. Presgrave*, 1 East 220, 228. In 2 Phill. on Insurance, § 1269, 3d ed., it is said, "Expenses incurred, sacrifices made, or damage sustained, for the common benefit of ship, freight, and cargo, constitute general or gross average." [He also cited Code de Commerce, liv. II., tit. XI., art. 400; Ordonnance de la Marine, liv. 3, tit. 7, art. 2; 1 Emérigon Traité des Assurances, par Boulay-Paty, 1827, tom. 1, ch. XII., s. 39, pp. 584, 585.] This question was involved in *Job v. Langton*, 6 E. & B. 779 (E. C. L. R. vol. 88), and *Moran v. Jones*, 7 E. & B. 523 (E. C. L. R. vol. 90), which was the converse of the other. Moreover, particular average is not confined to material damage sustained by the subject of insurance, but includes extraordinary expenditure of money laid out for the purpose of arresting the injurious effects of one of the perils insured against. In 2 Arnould on Insurance, p. 970, ch. v., s. 1, § 358, 2d ed., a particular average loss *350] is defined to be "loss arising *from damage accidentally and proximately caused by the perils insured against, or from extraordinary expenditures necessarily incurred for the sole benefit of some particular interest, as of the ship alone or the cargo alone." Phillips on Insurance, § 1422, note (1), refers to Arnould's definition among others, and therefore may be assumed to approve it. In Boulay-Paty, Droit Commercial Maritime, 1834, tom. 4, p. 478, it is said, "*Le dommage arrivé par l'échouement qui n'aurait été occasionné que par cas fortuit et force majeure, sans la volonté de l'homme serait avarie simple, cette perte n'ayant point eu pour objet le salut commun. Il en est de même des frais fait dans ces cas pour sauver les marchandises;*" and several instances are given showing that he also agrees with Arnould. [He also cited Code de Commerce, liv. II., tit. XI., art. 403, Bruxelles, 1833, tom. 2; Pardessus Droit Commercial, part IV., tit. IV., ch. IV., art. 731; 1 Emérigon Traité des Assurances, par Boulay-Paty, 1827, tom. 1, ch. XII., s. 39, pp. 584, 585; Pothier, Contrat d'Assurance, ch. III., s. 1, art. 112, 161.]

In *The Great Indian Peninsula Railway Company v. Saunders*, 2 B. & S. 266 (E. C. L. R. vol. 110), Erle, C. J., said, p. 274, he could conceive of such a custom as that particular average, when taken with reference to the common memorandum clause, excludes certain expenses. But the Court will not give different meanings to the same word in the same instrument. [BRAMWELL, B.—Suppose the clause were, "the insurers will not be liable for any damage unless it amounts to 3 per cent."] That way of putting it simply raises the question as to what is included under the word damage. [BRAMWELL, B.—Then suppose *351] the words were "damage together with any expenditure to prevent further damage," or "together with any expenses consequent thereon." Why should not those expenses be apportioned instead of the whole being attributed to the hull?] The term "average" must be taken to be used in its well-known sense, unless otherwise defined. The old formula *assecuratoris* which is given in *Loccenius de Jure*

Maritimo, 1727, lib. II., cap. v., s. 6, pp. 169–172, contains the following clause:—"Solvemus etiam expenso, cum causâ damni dati sive quid servatum fuerit, sive minus, et de expensis factis fidem habebimus ei, qui illas fecit, ad præstitum ab ipso juramentum absque omni contradictione." [He also cited Stypmannus de Jure Maritimo, curâ Heinneccii, 470, art. 480, 481.]

Assuming that general average could not arise in this case, and that particular average includes this expense, then the principle laid down in *Hagedorn v. Whitmore*, 1 Stark. 157 (E. C. L. R. vol. 2), by Lord Ellenborough applies here, that the clause providing for average on the whole or each as if separately insured allows the plaintiffs to do whichever is most for their interest. The plaintiffs are entitled therefore to allocate the whole expenditure to that part of the subject of insurance which was assailed by the damaging peril; and, the machinery not being damaged, it is as if it were not in the vessel. The argument that if the expenditure had not been incurred the machinery would have been injured or destroyed treats it as general average.

The practice of Lloyd's which is stated in *Stevens on Average*, p. 229, and *Benecke on Marine Insurance*, pp. 472–8, is without principle. It must, however, be admitted that these authors and English average-staters generally are consistent with themselves in *excluding [*352 expenditure from account under the memorandum, because they never take it into account as part of the damage to be covered by particular average; whereas Mr. Arnould, whilst differing from them on this latter point with the approbation of the Court of Queen's Bench in *The Great Indian Peninsula Railway Company v. Saunders*, 1 B. & S. 41 (E. C. L. R. vol. 101), yet inconsistently excludes it from account under the memorandum, and so far agrees with them: 2 Arnould on Insurance, p. 875, ch. III., s. 1, § 322. A custom conformable to the practice contended for on the other side is impolitic and unreasonable, because an unprincipled shipowner will instruct his captain to stand by in case of fire or other peril until the amount of damage done exceeds 3l. per cent. [He then stated how the practice at Lloyd's probably arose as stated in the Court below, 3 B. & S. 880, referring to 2 Valin Comment. sur l'Ordonnance de la Marine 113.]

The surveyors' fees are an expense consequent on the damage, which should follow the damage itself.

Mellish (*Bovill* and Sir *George Honyman* with him), for the defendant, was not called upon.

ERLE, C. J.—I am of opinion, notwithstanding the able argument of Mr. *Maclachlan*, that the judgment of the Court below is right. The insurance was for 14,000l. on the hull, and 8000l. on the machinery, of one and the same ship: there is a clause that average should be paid "on the whole or on each as if separately insured." The perils insured against were the usual perils; and there is the common memorandum, "warranted free from average under 3l. per cent., unless general, or the ship be stranded."

*A fire occurred on board, and including the expenses of the [*358 necessary survey the damage done to the hull was 386l. 12s. 6d., which is under 3l. per cent., on the sum insured upon the hull. The question arises as to the sum of 55l. 5s. 10d. expended in putting out the fire. The assured claims to add this to the 386l. 12s. 6d. which

would make the damage done to the hull more than 3l. per cent. on the value of the hull; to add, in fact, the expense of preventing further damage to the whole subject of insurance in respect of which need of aid occurred. I am not satisfied that he has a right to attribute the 55l. 5s. 10d. as an expense in respect of the hull only. It was an expense to stop further risk at a time when the danger of damage to the machinery was as great as that of further damage to the hull. By the expense of 55l. 5s. 10d. further damage to the ship and all damage to the machinery was saved: it was an expenditure for the benefit of the machinery as much as of the hull. I think, therefore, that the average-stater properly appropriated part of that expense to the machinery and part to the hull. If the hull and the machinery had been insured in separate instruments in different offices the charge of 55l. 5s. 10d. would necessarily have been apportioned between the two offices. And the same principle applies when there are separate subjects of insurance in the same instrument. The case is stated with perfect clearness by the Judges in the Court below. Mr. Justice Crompton, especially, goes fully into the matter.

WILLIAMS, WILLES and KEATING, JJ., and BRAMWELL and CHANNELL, BB., concurred. Judgment affirmed.

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*WILSON v. NELSON. May 11.

Marine insurance.—Valued policy.

A policy of insurance was effected upon freight to "be valued at as under." The policy was in the usual form, containing the common memorandum, which was immediately followed by the words, "On freight warranted free of capture, seizure, piracy, detention, or the consequences of any attempt thereat." In the margin nearly opposite, but a little above these words, "1300l." was written in figures. Held, that this was not a valued policy.

THIS was an action on the following policy of insurance dated the 12th August, 1862. "In the name of God, Amen. As well in their own names as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain in part or in all, did make assurance and cause themselves and them and every of them to be insured, lost or not lost, at and from Quebec to Antwerp, warranted to sail on or before, &c., upon any kind of goods and merchandises, and also upon the body, tackle, &c., of and in the good ship or vessel called The Genova, whereof is master, &c. The said ship, &c., goods and merchandises, &c., for so much as concern the assured by agreement between the assured and the assurers in this policy, are and shall be valued at as under." The policy then proceeded in the usual form, with the common memorandum; which was immediately followed by these words: "On freight warranted free of capture, seizure, piracy, detention, or the consequences of any attempt thereat." In the margin, nearly opposite but a little above these words, "1300l." was written in figures.

There were several pleas, but nothing turned on them.

*355] *The cause was tried before Shee, J., at the London Sittings after Hilary Term, 1864, when a verdict was returned for the plaintiff.

Edward James, in Easter Term, obtained a rule nisi for a new trial,

on the ground that the learned Judge misdirected the jury, by telling them that the policy was not a valued one, and consequently that the plaintiff was not precluded from recovering more than 1300*l*.

Bovill and *Watkin Williams* appeared to show cause, but the Court called on

Edward James and *Archibald*, in support of the rule.—[CROMPTON, J.—In 1 *Arnould on Insurance*, p. 357, 2d ed., the law is laid down thus:—"The difference between an open and valued policy in *point of form* is solely this: that in a *valued* policy this blank" (that is to say "are and shall be valued at —") "is filled up with the sum at which the parties agree to fix the amount of the insurable interest: in an *open* policy it is left in blank."] The blank here is filled up in effect, though the figures "1300*l*." are put in the margin. "To be valued at as under" are found in the usual forms of policies, and show an intention to state a value somewhere. The language of the policy is at least ambiguous. [CROMPTON, J.—That is against you: for the onus lies on you to show that the policy is a valued one.]

[Two valued policies: one on freight, and another on goods: were handed up to the Court as precedents.]

CROMPTON, J.—The two policies handed up to us, which are clearly valued policies, have confirmed me in my opinion that the policy before us is not a valued one. With respect to the expression in the policy, to "be valued at as under," the words "as under" are [*356 inserted merely for convenience in the writing. The object of a valued policy is to have the substantial matter of insurance declared, whereas the 1300*l*. mentioned in this policy is merely to regulate how much each underwriter is to contribute. It is true the 1300*l*. is not put on same line. But suppose it were, then comes this word "On," with a capital initial letter. That must mean "1300*l*. on freight warranted free of capture," &c. This part of the policy indicates two things: first, that 1300*l*. is the sum to be insured; secondly, that it is nowhere stated in the stringent and written part of the policy what the value of that freight is. The valued policies produced show clearly what the practice is, and I should read this document as a lawyer, 1300*l*. on freight warranted so and so, but not saying what amount it shall be. Parties who wish to make a policy a valued one must express that on its face.

BLACKBURN, J.—I also am of opinion that this is not a valued policy. The insurers bind themselves that they will, each according to his subscription, make good the loss. When an underwriter has underwritten a policy for 100*l*. it is necessary to know what proportion that bears to the sum insured; and when there are many underwriters it is an essential part of the contract to see what sum is insured in order to see what proportion each is to bear. The next question is what is the actual property at stake (for insurance is a contract of indemnity), and that in an ordinary policy, if nothing appears to the contrary, depends on the real value of the stake. But it is open to the parties to dispense with this; and, if they state on the face of the policy that as [*357 between them it shall be taken at such a value, it becomes all one as if it were of that value, and then the policy is called a *valued* policy. I have seen a great number of them, and I venture to say that such is the practice. The question then in all cases is, have the parties fixed the value? In the present case the ordinary printed form is

adopted. "The said ship, &c., merchandise, &c., for so much as concerns the assured by agreement between the assured and the assurers in this policy, are and shall be valued at as under." Then there is a break-off: and if that is enough to render a policy a valued one there never could be an open policy at all, for there are similar words in every Lombard Street policy. But this refers us to what is farther down: "On freight warranted free of capture, seizure, piracy, detention, or the consequences of any attempt thereat." Then in the margin, and in a manner a little ambiguous, are written the figures 1300*l*. Now, taking the grammatical sense of the words, and construing this like an ordinary instrument, and independent of mercantile practice, it means 1300*l*. on freight, not freight valued at 1300*l*. We have no mercantile evidence before us, but I entertain no doubt that brokers would so understand this. My judgment, however, does not proceed on that, but on the grammatical construction of the policy.

MELLOR, J.—When I first looked at this policy I was inclined to think it might be a valued policy. But the reasons given by my brothers Crompton and Blackburn are decisive that it is not. If it was intended to make it one (which I greatly doubt) the parties have not *358] expressed their intention. The burden of showing that this is a valued policy rests on the defendant, and he has failed to satisfy me of it.

SHEE, J.—I did entertain considerable doubt whether this was not a valued policy. But after what has fallen from the Court, and especially from my brother Blackburn, I am satisfied that it is not. In drawing up policies from these printed forms, it is usual to leave a good deal in which is not intended to be part of the insurance at all. It is usual also to control the meaning of the printed words by putting in others. And the words "as under" here mean no more than that, notwithstanding the printed form of words, the amount insured shall be 1300*l*. In Marshall on Insurance, p. 229–230, 4th ed., we find, "There may be many cases, however, where an assured may have an interest in the thing insured, but the amount of which it may be difficult or impossible for him to ascertain, at the time when it is necessary to insure. As where returns are expected from abroad, of which the exact value, and even the nature, are uncertain; so, in the case of a prize, where the real value of it can only be ascertained when it is brought into port and sold; and in every instance, where the owners have been prevented from receiving regular or satisfactory advices, from which the true amount of their interest might be ascertained. In these and similar cases, the assured must put a value upon the things insured in the best manner he can, according to his means of judging of it; and it seems proper, and is become customary, in such cases, to insert a clause of valuation in the policy, which specifies a given sum, as the value of the *359] interest of the insured. Thus:—*'In case of loss, the said ship is valued at 2000*l*., and the said goods at 5000*l*.'—Or it estimates the value as equal to the sums subscribed. Thus:—'The said ship, goods, &c., valued at the sum insured.' It is not uncommon, in such cases, to leave the value to be ascertained after the policy is effected, which then states the insurance to be on the subject-matter, 'as may be hereafter declared and valued.' " This, although written

many years ago, is little more than a repetition of what has now fallen from my brother Blackburn.

Archibald applied for leave to appeal, but the Court refused.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

WARD v. DAY and Another. May 10.

License.—Forfeiture.—Waiver.—Election.—Distress.—8 Ann. c. 14, 6, 7.

By deed made the 4th September, 1843, B. granted to A. license to get all the copperas stone which might be found in a certain part of the manor of M. for twenty-one years, at the yearly rent of 25*l.*, payable half-yearly on the 24th June and 25th December, with a proviso that if any part of the rent should be in arrear for twenty-one days, it should be lawful for B., his heirs and assigns, by notice in writing delivered to A., his executors, administrators, or assigns, to determine the grant. On the 31st January, 1856, J. H., who had become assignee of the license, assigned the license to the defendants by way of mortgage, and on the 5th August, 1857, it was absolutely assigned to the defendants by arrangement under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, who by oral agreement granted to J. H. the enjoyment of all the rights under it on his paying the rent thereby reserved. On the 27th March, 1858, the plaintiff, who had purchased the manor in August, 1854, distrained goods of J. H. and E. H., his son, lying on the part of the manor mentioned in the license, for arrears of rent due at Christmas, 1857. J. H. and E. H. thereupon brought actions against the plaintiff for the illegal distress, in which he suffered judgment by default; and in 1858, negotiations for a settlement of the actions and for granting a new license to E. H. for a further term of twenty-one years, commencing on the 24th June, 1864, the day on which the grant of the 4th September, 1843, would expire, were carried on between the attorneys of J. H. and of the plaintiff, and it was verbally arranged between the plaintiff's attorney and the attorney for J. H. and E. H. that the actions should be settled on certain terms, one of which was, that such a license should be granted to E. H. These terms the plaintiff refused to carry out. On the 3d July, 1858, the plaintiff gave a written notice to the defendants and J. H., pursuant to the proviso, to determine the license. On the 11th January, 1859, the defendants tendered to the plaintiff 50*l.* for two years' rent due at Christmas, 1858, which the plaintiff refused to accept. In trespass for breaking and entering the plaintiff's close and taking away copperas stone, the Court having power on a special case to draw inferences of fact:

1. Held, affirming the judgment of the Court below, that the plaintiff, after the cause of forfeiture had occurred, sufficiently expressed and communicated to the defendants his determination to treat the license as existing, and was bound by that election, and therefore the subsequent notice was inoperative.

2. *Quære*, whether, the distress being within six months after the cause of forfeiture, the period within which, by stat. 8 Ann. c. 14, ss. 6, 7, a lessor may distrain after the determination of a lease, would by itself amount to an election to treat the license as existing?

THE plaintiff having brought error on the judgment in this case, reported vol. 4, p. 337, it was now heard before ERLE, C. J., WILLIAMS, WILLES and KEATING, JJ., and BRAMWELL, CHANNELL and PIGOTT, BB.; POLLOCK, C. B., being present during part of the time.

Lush (J. A. Russell with him), for the plaintiff.—The plaintiff had a right to put an end to the grant by his predecessor to the predecessor of the defendant. And he has not waived this right by making an illegal distress, supposing the distress were illegal, for a party cannot be estopped by an unlawful act. [WILLIAMS, J.—It is equally an affirmance of the tenancy.] Affirmance of a tenancy can only be by some act of the landlord indicating to the other party that he treats him as his tenant. A distress under a demise when no rent was due is different, for there the relation of landlord and tenant exists already. Here

the distress was made under a mistaken notion of the existence of that relation. Neither does the negotiation for a new grant make any difference.

*361] **Joseph Brown (Bowen with him), contra.*—The Court is called on to determine a question of fact, rather than a question of law, namely, whether the forfeiture in this case was waived. [He cited *Green's Case*, Cro. El. 3, and *WILLES, J.*, referred to *Dendy v. Nicholl*, 4 C. B. N. S. 376 (E. C. L. R. vol. 93).] Neither could the landlord have supposed that he was distraining under stat. 8 Ann. c. 14, ss. 6, 7, because by the terms of the grant it could only be determined by notice in writing; the landlord must therefore have meant to distrain as at common law on a continuing tenancy. But his mistake was in imagining that he could distrain on the grant of an incorporeal hereditament in the form of a license. [ERLE, C. J., referred to *Croft v. Lumley*, 5 E. & B. 648 (E. C. L. R. vol. 85.(a))] The whole case must be taken together, and consequently the subsequent negotiation cannot be disconnected from the rest of it.

Lush, in reply.—In *Green's Case* the tenant did not repudiate the act; and in *Dendy v. Nicholl* the action was for rent accrued due after an alleged forfeiture of which the plaintiff was aware. In *Croft v. Lumley* the lessor insisted on certain money being taken as rent, but the Court thought that the party who pays the money may pay it on what footing he pleases.

ERLE, C. J.—This case raises the question whether there was evidence from which a jury ought to have come to the conclusion that the forfeiture of a grant of license had been waived. D. Banks, being *362] seised in fee of a manor, had granted to D. Austin "leave and license to search for, pick and get, and carry away, all or any of the copperas stone or pyrites which might be found on the shore of the said manor between high and low water mark," for a term of years, at a yearly rent, payable half-yearly, with a proviso for determining the grant, by notice in writing, if the rent should be in arrear for twenty-one days. D. Austin assigned the right to J. Hall, who paid rent for it to the executors of D. Banks, who conveyed the manor to the plaintiff. J. Hall assigned the grant to the defendants, who afterwards made a re-grant of it to him, by which he claims possession. But the rent was in arrear for twenty-one days, and the question is, has the grantor waived his right to the forfeiture which occurred at the end of that time? The Court below said "Yes," because he had made a distress for that rent, and consequently done an act which in one sense might be said to be a recognition of a continuing tenancy. I doubt if, under stat. 8 Ann. c. 14, ss. 6, 7, that argument could be relied on, and therefore, for the present, will assume so far in favor of Mr. *Lush*. But the distress so made led to an action for the illegality of it, and damages were assessed to a large amount. A negotiation then took place in which the landlord was one party, the tenant another, and E. Hall, son of J. Hall, was another, and that negotiation resulted in an agreement that when the term of the grant should expire a fresh term should be granted to the son,—an agreement not binding because there was no writing. The money stipulated for being about to be paid, the plaintiff saw reason to withdraw from the engagement.

(a) Affirmed in Exch. Ch. 5 H. & B. 662, and in the House of Lords, 6 H. L. C. 672.

When a landlord elects not to take advantage of a forfeiture, and declares to the party against whom he could *enforce it that he will not do so, he is bound by that election. The continuance [*363 of the tenancy being affirmed by him he thereby waives the forfeiture. In proof of this I will take the language of Green's Case, Cro. El. 8, "It was clearly resolved that the bare receipt of the rent after the day was no bar, for it was a duty due to him; but a distress for the rent, or a receipt of the rent due at another day, was a bar, for those acts do affirm the lessee to have lawful possession. So, if he maketh him an acquittance with a recital that he is his tenant; and in this case by calling him his *fermor*, this is a full declaration of his meaning to continue him his tenant;" and that case was accordingly recognised in Doe d. Nash v. Bird, 1 M. & W. 402, 406. In the note also to 1 Smith's Leading Cases, p. 30, 4th ed., it is said, "Other acts of the lesser, besides acceptance of rent, have been held to waive a forfeiture, when they show an intention on his part that the lease should continue."

We think, therefore, here was a full declaration that the lease should continue, a grant having been made for the further term of twenty-one years from the day when the original grant was to expire; and as the jury say that the plaintiff meant to waive the forfeiture, having once done so he cannot be allowed to retract.

WILLIAMS, J.—I agree with the Lord Chief Justice, and wish to add that I do not think it a mere question for the jury whether the landlord had an intention of waiving the forfeiture by lying by and seeing the tenant carrying on a prohibited trade on the premises. To hold so would be contrary to Doe d. Sheppard v. Allen, 3 Taunt. 78. The *true [*364 question in such cases is whether the landlord affirmed the continuance of the tenancy in that way, in such a manner that he must necessarily have intended it to become known to the tenant, and may be well understood to have acted under the belief that the tenancy was to be continued.

I had some doubt during the argument whether there was evidence for the jury of that, but now, for the reasons given by Lord Chief Justice Erle, I think we ought not to interfere with the decision of the Court below.

The rest of the Court concurring,

Judgment affirmed.

[MICHAELMAS VACATION, XXVIII. VICT.]

REEVE, Appellant, WOOD, Respondent. [Nov. 28.]

Evidence.—Baron and feme.—Competency of witness.—Vagrant Act, 5 G. 4, c. 83, s. 8.

Upon an information, under stat. 5 G. 4, c. 83, s. 8, against a person able to maintain his wife and children, for neglecting and refusing to do so, whereby she and they became chargeable to a Union, the wife of the accused is not a competent witness against him.

CASE stated at the instance of the informant, pursuant to stat. 20 & 21 Vict. c. 43.

At a Petty Sessions holden for the city of Worcester, the 18th July, 1864, before two justices of the peace, Charles Wood appeared, charged by an information laid by Thomas Sutton Reeve, by direction and in

*365] pursuance of an order of the Board of Guardians of the Worcester Poor Law Union, for that he, the said Charles Wood, at the parish of St. Helen, in the city of Worcester, on the 23d June last past, being then and there a person able wholly or in part by work or other means so to do, did wilfully neglect and refuse to maintain his lawful wife Mary Anne Wood and their three children, by reason of which neglect and refusal she and they did become chargeable to the common fund of the Worcester Poor Law Union, and had continued and were then so chargeable, contrary to the statute in such case made and provided. In order to prove the offence with which the defendant was charged, his wife was tendered as a witness. The defendant thereupon objected that the evidence of his wife was not admissible against him, on the ground that the offence with which he was charged was of a criminal nature. It was argued, on the part of the informant, that although the defendant was charged under The Vagrant Act, 5 G. 4, c. 83, s. 3, with a criminal offence, punishable by imprisonment, still the case should be treated as a personal wrong to the wife; and suggested the almost certain impossibility of proving in detail all the facts necessary to constitute the offence, without such evidence. The observations of Crompton, J., in *Sweeney, appellant, Spooner, respondent*, 3 B. & S. 329, 332, were referred to.

The justices were of opinion that the offence consisted in creating a chargeability to the Union, and not in a wrong done to the wife, and therefore that her evidence could not be received. They therefore dismissed the charge, reserving the question whether they were right in so doing.

*366] *Henry Matthews*, for the appellant.—The proceeding, it is true, is a criminal one, and therefore the wife is not rendered competent to give evidence against her husband by stat. 14 & 15 Vict. c. 99. But the case, although not one where a forcible personal injury has been inflicted on the wife, is still within the rule of law whereby a wife is, in cases of injuries inflicted on her by her husband, a competent witness. [BLACKBURN, J.—Must not the injury be a *personal* one?] It must be directly or indirectly a wrong to her personally, but it need not necessarily be accompanied by force or violence. Thus in *Rex v. Wakefield*, 2 Lew. C. C. 1, 279, where several persons were indicted for misdemeanour in conspiring to carry away a young lady under the age of sixteen from the custody appointed by her father, and to cause her to marry one of the defendants, and also for conspiring to take her away for the same purpose *by force*, it was held by Hullock, B., that, assuming her to be the lawful wife of one of the defendants, she was a competent witness for the prosecution, although there was no evidence to sustain that count of the indictment which charged force. Again, in *Reg. v. Yore*, 1 Jebb & Symes 563, a married woman was admitted as a witness against her husband to prove her own abduction. [He also cited *Rex v. Pierson*, Andr. 310.] [BLACKBURN, J.—Abduction is a personal wrong to a woman, even though at the time she be consenting. CROMPTON, J.—Surely the offence charged in the present case, being an offence under The Vagrant Act, 5 G. 4, c. 83, s. 3, is rather against the parish *367] to which the wife has become chargeable than against the woman herself.] A refusal to maintain the wife is also a personal wrong to her. The practice has been to admit such evidence as this. In 1 Phillips on Evidence (10th ed.), p. 82, it is said, that “in

proceedings before justices under The Vagrant Act, against a husband for neglecting to support, or deserting his wife and family, it is believed to be the universal practice, as also at Sessions in the case of an appeal, to admit the wife as a witness. This practice is presumed to have arisen from the necessity of the case, for although instances frequently may and must arise where all the facts necessary to insure a conviction might be proved by other witnesses, yet it must often happen that some of the circumstances, such as the husband's ability to support his family, or the act of desertion, could be proved only by the wife." [CROMPTON, J.—But, at p. 83, the same author says, "The exception as to the admissibility of the wife is confined to cases of personal injuries effected by violence or coercion. Therefore upon an indictment for a conspiracy in procuring a young female, who was a ward in Chancery, to marry, she is not admissible either for or against her husband;" and he cites as authorities for this statement *Rex v. Locker*, 5 Esp. 107, *Rex v. Serjeant*, Ry. & Moo. 352 (E. C. L. R. vol. 21). My own impression was that it was not the practice to examine the wife in these vagrancy cases. MEL-LOR, J., stated that, when acting as counsel at Sessions, he had been in the habit in similar cases of examining the wife, without any objection being raised. *West*, amicus curiæ, informed the Court that the practice at the West Riding Sessions, *where such cases are of frequent occurrence, is to reject the wife's evidence. BLACKBURN, J.—[*368 The principle of the decisions on this subject seems to have been, that the injury must be one which is, or is likely to be, within the *exclusive* knowledge of the wife.] Here she would most probably be an exclusive witness to the fact that her husband had refused to support her; and consequently would be a witness admissible on the ground of necessity.

No counsel appeared for the respondent.

CROMPTON, J.—I think that the magistrates were right in this case. In early times an exception was made to the general rule that a wife is not an admissible witness against her husband, namely, in the case of personal wrongs inflicted by him upon her. That arose partly from the mischief which would have followed from her exclusion, partly from necessity, and partly from the consideration that she was in reality the prosecuting party. This case is not, it seems to me, within the exception. The instance of abduction, which has been referred to, is distinguishable, for there there may well be considered to be what is equivalent to an actual personal injury. Here there is nothing of the sort, and indeed the crime is rather against the parish to which the woman becomes chargeable than against herself. Nor does the case come within the rule of necessity: for the offence may certainly be made out without the wife's evidence. I was somewhat surprised at the statement in Phillips on Evidence, p. 82, 10th ed., as *to the "uni- [*369 versal practice" of admitting this kind of evidence. But from what Mr. *West* has told us, my own impression that it was not generally allowed has been confirmed. On the whole, therefore, considering that this was not a case of personal wrong, I am of opinion that the evidence was rightly rejected.

BLACKBURN, J.—The general rule is that the wife is not admissible as a witness against her husband; but in civil cases,—with which, however, we have at present no immediate concern,—various statutory exceptions have been made; and in criminal matters from an early period,—

I believe the case of *Lord Audley*, 3 How. St. Tr. 402, is the earliest on record,—an exception was admitted to the rule; which went on the principle that where the offence charged touched the person of the wife, and where, therefore, she must be cognisant of it, and might perhaps be the *only* person cognisant of it, she was an admissible witness. Two cases of abduction have been mentioned, but in them there must have been an actual carrying off of the woman, and therefore, even although no personal injury were inflicted, they may well be considered within the principle I have mentioned. However that may be, I am clearly of opinion that this case is not within it. It may be questionable whether the law upon this head is satisfactory, but that is matter for the Legislature and not for us.

MELLOR, J.—I also am of opinion that the justices were right in not admitting this evidence. All the cases on the subject are explainable *370] upon the ground mentioned *by my brother Blackburn. No distinct authority has been brought before us to show that in such a case as the present the evidence of the wife is admissible. If there had been such an authority, no doubt it would have been referred to.

Judgment for the respondent.(a)

(a) This case is reported by Arthur Charles, Esq.

HARRIS v. SWINBURN. May 27.

Costs.—*The Summary Procedure on Bills of Exchange Act*, 1855, 18 & 19 Vict. c. 67.—*The London (City) Small Debts Extension Act*, 1852, 15 & 16 Vict. c. lxxvi.

A plaintiff who commences an action under *The Summary Procedure on Bills of Exchange Act*, 1855, 18 & 19 Vict. c. 67, for a cause within the jurisdiction of the city of London Small Debts Court, and, after the defendant has obtained leave to plead under sect. 2, recovers an amount not more than 50*l.*, is deprived of his costs by the *London (City) Small Debts Extension Act*, 1852, 15 & 16 Vict. c. lxxvii. s. 119.

THIS was an action on a bill of exchange for 50*l.*, brought under the provisions of *The Summary Procedure on Bills of Exchange Act*, 1855, 18 & 19 Vict. c. 67. The defendant obtained leave to appear and defend the action under sect. 2, and, among other pleas, paid 20*l.* into Court.

On the trial, before Mellor, J., at the Sittings in London, the plaintiff recovered damages, which, together with the 20*l.* paid into Court, amounted to less than 50*l.* The learned Judge declined to certify that the action was fit to be brought in the superior Court.

Afterwards, the question whether the plaintiff was entitled to costs on the ground that the action ought to have been brought in the Sheriffs Court, was raised at Chambers and referred to the Court; and, the Court *371] *desiring that the matter should be put on record in order that it might go to error if necessary, the following suggestion was entered on the roll:—"And now, on the 8th day of May, A. D. 1863, the defendant suggests, and gives the Court here to understand and be informed, that the defendant dwelt and carried on business within the city of London, or the liberties thereof, at the time of this action brought; and that the plaintiff did not at the time this action was brought dwell more than twenty miles from the defendant, and that neither the plaintiff nor

the defendant then was or is an officer of the Court holden under the provisions of The London (City) Small Debts Extension Act, 1852, and that this action was commenced for a cause for which a plaint might have been entered in the Court holden under the provisions of the last-named Act."

Plea. That this action was commenced about the 24th day of October, A. D. 1855, on a bill of exchange, by a writ of summons issued under the provisions of The Summary Procedure on Bills of Exchange Act, 1855, in the form contained in Schedule A. to that Act annexed, and endorsed as therein mentioned, and not otherwise, and for no other cause of action whatsoever; and that Her Majesty has not by any order in council directed that all or any part of the provisions of that Act should apply to the said Court holden under the provisions of the Act in the suggestion mentioned.

Demurrer, and joinder.

Keane, for the defendant.—The plaintiff's adoption of the process given by The Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67, does *not relieve him from the operation of [*372 The London (City) Small Debts Extension Act, 1852, 15 & 16 Vict. c. lxxvii., s. 119, for depriving plaintiffs of costs who sue in a superior Court. Sect. 1 of stat. 18 & 19 Vict. c. 67, which entitles the plaintiff to sign judgment for costs, relates solely to judgments by default; and *Healey v. Johns*, 8 E. & B. 946 (E. C. L. R. vol. 92), was decided upon that section. Sect. 2, by which a defendant may obtain leave to appear and defend the action, says nothing about costs; and this is a case under that section. In actions founded on contract, stat. 15 & 16 Vict. c. lxxvii., deprives the plaintiff of costs in two events; first, by sect. 119, in actions for any cause other than those specified in sect. 118, where a verdict is found for a sum not more than 50*l.*, unless the Judge who tries the cause certifies, and secondly, by sect. 120, in any action, not being for breach of promise of marriage, where the plaintiff recovers a sum less than 20*l.*, unless the Judge certifies, and except in the case of a judgment by default.

Further, by the County Courts Amendment Act, 19 & 20 Vict. c. 108, s. 4, the provisions of the County Courts Acts are to apply to any debt, not exceeding 20*l.*, although secured upon a bill of exchange or promissory note, and notwithstanding stat. 18 & 19 Vict. c. 67; therefore, so far as regards actions and judgments on such bills and notes, the two statutes are in conflict, and the later repeals the earlier. [He also referred to sect. 30 of stat. 19 & 20 Vict. c. 108.]

Joseph Brown (*Oppenheim* with him), for the plaintiff.—*Stat. [*373 18 & 19 Vict. c. 67, s. 1, which gives to holders of bills and promissory notes a summary mode of proceeding and obtaining judgment in the superior Courts, repeals, as far as regards proceedings under it, those sections of the London (City) Small Debts Extension Act which say that a plaintiff may not sue in a superior Court except under the penalty of losing his costs. It is not likely that the Legislature would give costs when judgment is allowed to go by default, and would withhold them when an unfounded defence was pleaded. Costs would be increased by compelling holders of bills and promissory notes to sue in Small Debts Courts, where the defendant may plead without leave. [COCKBURN, C. J.—When a Judge, under sect. 2 of stat. 18 & 19 Vict.

c. 67, gives leave to a defendant to appear and defend the action, he might impose the terms that no suggestion as to costs should be entered: that would enable both statutes to be worked together.] The Legislature had in contemplation that stat. 18 & 19 Vict. c. 67, would be extended to other Courts, for sect. 9 empowers her Majesty, by order in council, to direct that the Act shall apply to any Court of record.

Keane was not called upon to reply.

COCKBURN, C. J.—Our judgment must be in favour of the suggestion to deprive the plaintiff of his costs, and the demurrer to the plea must therefore prevail. It is clear that, independently of The Summary Procedure on Bills of Exchange Act, 1855, the plaintiff who has brought this action in a superior Court, the cause of it being within the jurisdiction of the Sheriffs Court, would not be entitled to costs; and the *374] question is, *whether there is anything in stat. 18 & 19 Vict. c. 67, to alter the state of things which existed at the time it passed. I am of opinion that there is not. If the plaintiff contemplates that there is no defence to his action, he may take advantage of the summary mode of procedure which sect. 1 of the statute points out; but, when there is a presentable ground of defence, the statute does not deprive the defendant of the right of submitting it to the consideration of the jury. Under sect. 2, when there is reasonable ground, a Judge will give leave to defend the action; and then the Legislature intended that the ordinary rule as to costs should prevail. The plaintiff must exercise his discretion whether he will adopt the mode of proceeding given in stat. 18 & 19 Vict. c. 67, s. 1, at the risk of losing his costs, by reason of a provision in some other Act depriving the plaintiff of costs in case he does not recover a sufficient amount. I cannot doubt that this is a case omitted by the Legislature, but I see nothing in this Act to alter the position in which a plaintiff stands under the operation of the London (City) Small Debts Act, 1852. It may be that the Legislature left it to persons who thought it expedient that the provisions of stat. 18 & 19 Vict. c. 67, should be extended to Courts with local jurisdiction, to resort to the Queen in council for an order to that effect under sect. 9; but there is nothing in that Act to do away with the provisions of the London (City) Small Debts Act which deprive the plaintiff of his costs.

CROMPTON, J.—It is said to be the opinion in the city of London that it is hard upon plaintiffs that they should be deprived of costs in these *375] cases; but that *hardship may be remedied by applying for an order in council under stat. 18 & 19 Vict. c. 67, s. 9. We must endeavour to see what is enacted in these confused Acts on County and Small Debts Courts. We must not rely too much on the supposed intention of the Legislature; for no doubt the construction suggested by the defendant will prevent plaintiffs from making use of the provisions of the Summary Procedure on Bills of Exchange Act, 1855, so freely as they otherwise would. The present case is distinguishable from *Healey v. Johns*, 8 E. & B. 946 (E. C. L. R. vol. 92), for the first section of stat. 18 & 19 Vict. c. 67, enacts that, if the defendant does not appear, in which case the costs would be very small, the plaintiff may at once sign final judgment for any sum not exceeding the sum endorsed on the writ, together with interest, “and a sum for costs,” &c.

But I think there is much force in the argument of Mr. *Lush* in that case, that the words in sect. 1 are to be understood as amounting to no more than that the plaintiff shall sign judgment with costs where they are recoverable by law. However, we are not called upon to decide that point. The present case, in which the defendant obtained leave to appear, is governed by sect. 2, and, there being no express words in it giving costs, it is argued that it must be implied that the plaintiff should get his costs, for otherwise plaintiffs could not use The Summary Procedure on Bills of Exchange Act, 1855. But that is too vague an argument for us to proceed upon. When a Judge has given a defendant leave to appear, and he appears accordingly, the action proceeds as if it had been commenced by an ordinary eight day writ. As has been suggested by the Lord Chief Justice, the *Judge, when he gives the defendant leave to appear, may impose terms as to entering a suggestion to deprive the plaintiff of costs; subject to that the action proceeds with all the consequences as to costs which belong to an ordinary action.

SHEE, J.—One principal object of all enactments depriving the plaintiff of costs is to diminish the evils arising from the delay and unnecessary expense of an action in one of the superior Courts. If the holder of a dishonoured bill of exchange or promissory note knows that his debtor has no defence to an action on it, he may take advantage of the Summary Procedure on Bills of Exchange Act, 1855; and in case the debtor does not obtain leave to appear, the plaintiff has his remedy under sect. 1. But if the debtor thinks that he has a defence under sect. 2, and obtains leave from a Judge to appear, the case comes within the provisions of the London (City) Small Debts Extension Act, 1852, if the cause of action arose within the district of the Court established under that Act. The plaintiff must suffer the consequences of having injudiciously taken proceedings under the Summary Procedure on Bills of Exchange Act, 1855, and lose his costs, unless he recovers a sufficient amount to entitle him to them.

My brother Blackburn, who has been obliged to leave the Court, authorized me to say that he entirely concurs in our judgment.

Judgment for the defendant.

*THE QUEEN v. THE INHABITANTS OF GREAT
SALKELD. [*May 28.*]

[*377.]

Pauper.—Residence in union.—Irremovability.—9 & 10 Vict. c. 66, s. 1.—24 & 25 Vict. c. 55, s. 1.

Stat. 9 & 10 Vict. c. 66, s. 1, enacts that no person shall be removed from any parish in which he shall have resided for the five preceding years. By stat. 24 & 25 Vict. c. 55, s. 1, "the period of three years shall be substituted for that of five years in" the former Act, "and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish." Held, per Cockburn, C. J., and Shee, J., Crompton, J., dissentiente, that a pauper who, having resided three years in a parish, removed to another parish in the same union, and after residing there for some months, became chargeable, was removable to the parish of his settlement.

UPON appeal at the Michaelmas Quarter Sessions for the county of Cumberland in 1863, against an order for the removal of John Mallin-

son and Hannah his wife, and their five children, from the township of Plumpton Wall to the parish of Great Salkeld, the order was confirmed, subject to the following case.

The pauper John Mallinson, who is now forty-two years of age, never resided in any parish or township in the Penrith Union other than the parish of Great Salkeld and the township of Plumpton Wall, and he was resident in Great Salkeld continuously from the year of his birth until he removed to Plumpton Wall on the 1st July, 1862. He became legally settled in Great Salkeld in 1842, by apprenticeship, and also gained a second settlement there in 1857, by renting a tenement. While so residing in Great Salkeld with his wife and family he, in the month of December, 1860, became chargeable thereto and applied for relief to the relieving officer of the Penrith Union, and was relieved by him at the charge and expense of Great Salkeld from the 14th December, *378] 1860, to the 6th July, 1861, with the *exception of a fortnight. During the period from the 14th December, 1860, to the 6th July, 1861, he and his family resided in Great Salkeld.

On the 1st July, 1862 (up to which time the pauper and his family had resided in Great Salkeld), the pauper took a cottage in Plumpton Wall and removed there with his wife and family. On the 30th September, 1862, the pauper, whilst residing in Plumpton Wall, again became chargeable, and applied to the relieving officer of the Penrith Union, for relief; the officer brought the case before the Board of Guardians of that Union, who ordered the pauper to be relieved from the common fund of the union, and this continued till the 22d June, 1863, when the Board of Guardians, on the complaint of the parish officers of the parish of Penrith, in the same union, stopped the relief from the common fund. The pauper continuing chargeable to Plumpton Wall after the stoppage of the common fund relief, the parish officers of that township obtained the present order of removal.

If the Court should be of opinion that the residence in the parish of settlement should not be included in the calculation of the three years' residence in a union required to establish the status of irremovability under stat. 24 & 25 Vict. c. 55, s. 1, the order was to be confirmed. If the Court should be of a contrary opinion, the order was to be quashed.

Mellish, in support of the order of Sessions.—Stat. 24 & 25 Vict. c. 55, s. 1, enacts that “the period of three years shall be substituted for that of five years in” sect. 1 of stat. 9 & 10 Vict. c. 66, “and the residence of a person in any part of a Union shall have the same effect *379] *in reference to the provisions of the said section as a residence in any parish.” Therefore, a person is not removable from a union within which he has resided for three years; but if he has been resident for less than the required period in different parishes in the same union, one of which is the parish of his settlement, he is still removable to that parish. He would be removable if he went to a parish out of the union unless he was absent three years, and it cannot have been intended that if he went for however short a time from the parish of his settlement within a union to another parish within it, he should not be removed back: for this would have the effect of charging his maintenance on the common fund of the union, under stat. 11 & 12 Vict. c. 110, s. 3, if, when he becomes chargeable, he is out of the parish of his settlement but within the union, though it would be

charged on the parish of his settlement if he was out of the union. The residence intended in stat. 24 & 25 Vict. c. 55, s. 1, is a residence out of the parish of settlement; the period of residence in the parish of settlement within the union is not to be counted as part of the three years. The effect of the statute is, that the word "union" is substituted for "parish" in stat. 9 & 10 Vict. c. 66. Stat. 24 & 25 Vict. c. 55, s. 1, was passed to prevent the hardship of a pauper being removed to the parish of his settlement by reason of temporary sickness, and does not apply to such a case as this. [CROMPTON, J.—Stat. 24 & 25 Vict. c. 55, s. 1, is the first step towards abolishing the law of settlement.]

Maule, contra.—Stat. 24 & 25 Vict. c. 55, s. 1, cannot *con- [*380] template irremovability from one union to another union; for the object of stat. 9 & 10 Vict. c. 66, s. 1, which it amended, was to prevent removal from one parish to another. And there is no such thing in the law as a union settlement or removal from one union to another: removal must be to some area in which a settlement is gained. The proper construction of stat. 24 & 25 Vict. c. 55, s. 1, is, that residence in a union shall have the same effect with regard to removal out of a parish as residence in a parish; and there is no hardship on unions in this. "Union," as the place of residence, is to be substituted for "parish" in stat. 9 & 10 Vict. c. 66, s. 1, but not as the place of irremovability.

COCKBURN, C. J.—I am of opinion that this order is good, and ought to be confirmed. The effect of the recent statute, 24 & 25 Vict. c. 55, s. 1, so far as regards the area of residence necessary to confer irremovability, is, that it has made a person who becomes chargeable irremovable when he has resided the required time within any part of a union, as distinguished from any part of a parish. Under stat. 9 & 10 Vict. c. 66, s. 1, a pauper, in order to be irremovable, must have resided in the same parish for five years. Stat. 24 & 25 Vict. c. 55, s. 1, which shortens the period of residence to three years, also says, that "the residence of a person in any part of a union shall have the same effect in reference to the provisions of" sect. 1 of stat. 9 & 10 Vict. c. 66, "as a residence in any parish." It is true, as Mr. *Maule* argued, that in strict legal sense there is no such thing as irremovability from a union; although the parish in *which a pauper has resided is a constituent [*381] part of a union, he is not removed from the union, but from that particular parish. But, looking at the object of stat. 9 & 10 Vict. c. 66, and transferring the word "union" into sect. 1 from the recent statute, I think we should construe it as enacting that a residence for three years in any particular parish within the ambit of a union confers irremovability. In order to prevent persons who had fixed themselves in a particular neighbourhood being torn away from the associations of a whole life, it was considered expedient to extend the area of irremovability to contiguous parishes within the same union, so that as between two parishes, one within and the other without a union, the pauper would become irremovable by residence in one of them for three years. But it was not intended to interfere with the rights and liabilities of parishes in the same union, and to make a pauper by a residence of a few days in a parish irremovable as between parishes in the same union. That would be an injustice as regards the basis of the law of settlement, against which we ought to struggle in construing the recent statutes.

CROMPTON, J.—I have great difficulty in avoiding the inconvenience.

which, as has been pressed on us very ably, will follow the construction contended for by the appellant parish. If it had been foreseen, the Legislature might easily have obviated it; but they did not look at all the consequences of an enactment which they thought beneficial to the labouring classes. The difficulty I feel is in finding any words in stat. 24 & 25 Vict. c. 55, s. 1, to carry out the view which the Lord Chief *382] Justice and my brother Shee entertain. It has been *held, in all the cases, that a person coming within the statutory provisions preventing his removal gains a status of irremovability from a particular parish. There is no such thing as removability except from one parish to another. According to my view, the enactment has not the effect which Mr. *Mellish* suggests of substituting the word "union" for "parish" in stat. 9 & 10 Vict. c. 66, s. 1. By the earlier statute, a person was irremovable from a parish if he had resided in it five years. The recent statute does two things: it shortens the period of residence, and thereby remedies the hardship arising from the operation of the law as to removal: and it gives the ambit of the union as the limit within which a person may reside without being subject to removal. The section is, "That after the 25th March next the period of three years shall be substituted for that of five years specified in" section 1 of stat. 9 & 10 Vict. c. 66, and then, departing from the words used in its own first branch, it does not say that the word "union" shall be substituted for "parish," but "the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish." The effect of residence for three years in a parish would be to prevent removal from the parish. So residence in any part of a union prevents removal from any parish within the union in which the pauper is at the time of applying for relief. The other construction may be most convenient, and may be correct, but my mind does not adopt it.

SHEE, J.—I feel great diffidence in differing from the opinion of my brother Crompton; but, on the whole, I think the construction con- *383] tended for by Mr. *Mellish* *correct. The object of stat. 9 & 10 Vict. c. 66, s. 1, was to improve the condition of the poor by enabling them to claim a right to remain in a parish after having devoted their labour to it for a period of five years. That provision being thought insufficient, stat. 24 & 25 Vict. c. 55, s. 1, was passed, substituting the period of three years for five in the former statute, and giving to residence in any part of a union the same effect as residence in a parish; so that residence for three years in any of the parishes forming a union should entitle a person to remain in the union. The construction which makes the enactment apply to two parishes within the same union would give rise to great hardship on one of them. Therefore I think we shall satisfy the intention of the Legislature by construing the recent enactment as substituting the words "from any union" for "from any parish" in sect. 1 of the earlier statute. Order confirmed.(a)

(a) The doubt raised in this case has been removed by stat. 27 & 28 Vict. c. 105, which enacts, sect. 1, "That in the case of any poor person heretofore chargeable or hereafter becoming chargeable in any parish comprised in a union not being the parish of his settlement the period of time during which he shall have resided in the parish of the settlement, if in the same union, shall not be excluded in the computation of the time of residence required to render him exempt from removal under the statutes above referred to." 9 & 10 Vict. c. 66, and 24 & 25 Vict. c. 55. See also the Union Chargeability Act, 28 & 29 Vict. c. 79.

ROBERTS and Wife v. ROBERTS. [June 3.] [*384Slander on wife.—Special damage.—Unchastity.*

Declaration by husband and wife, alleging that she was a member of a sect of Protestant Dissenters, and also a member of one of the private societies of that sect, and that the sect and its Societies are subject to rules and regulations, and the members of the sect and its Societies are subject to rules and regulations, and under the control and authority of the Societies and of their leaders with respect to the moral and religious conduct of the members, and their being allowed to be and continue members; and by the rules and regulations a member of one Society in the sect cannot become a member of another Society in the sect unless the leaders or elders of the first certify that the member is morally and otherwise fit to be a member, and that, by reason of words spoken of the wife imputing want of chastity to her, she was not allowed to continue a member of the Society, and the leaders or elders refused to certify that she was morally or otherwise fit to be a member of the sect, &c., and she was not allowed to become a member of the Society in L., and was prevented from attending religious worship, and she became injured in her good name and reputation, and sick and greatly distressed in body and mind. On demurrer: held, that the special damage alleged was not sufficient to make the words actionable.

THE declaration stated that the plaintiff, Margaret, was a member of a sect of Protestant Dissenters, to wit, Calvinistic Methodists, and was a member of a private society and congregation of that sect held at Denbigh in North Wales, and the sect, and the different Societies of it, were subject to certain rules and regulations, and the different members of the sect and the Societies were respectively subject to those rules and regulations, and under the control and authority of the several respective Societies and of the leaders of the same, with respect to the moral and religious conduct of such members, and with respect to their being respectively allowed and permitted to be and continue to be members of the different Societies and congregations of the sect, and by those rules and regulations a member of one Society in the sect could not become a member of another Society in *the sect unless the leaders or elders of the first-mentioned Society certified that the said member was morally and otherwise fit to be a member of such sect and of a Society of the same; and the defendant, being a member of the sect and of the Society to which the plaintiff Margaret then belonged, and well knowing the premises, falsely and maliciously spoke and published of the plaintiff Margaret, and of her as a member of such sect and Society, and in the presence of the leaders or elders and other members of the Society and congregation which the plaintiffs and the defendant had just before then been attending, the false and scandalous words following in the Welsh language (setting them out), which words being translated into the English language have the meaning and effect following, and were so understood by the persons to whom they were so spoken and published, that is to say, "You" (meaning the plaintiff Robert Roberts) "have got for a wife" (meaning the plaintiff Margaret) "as great a whore as any in the town of Liverpool. I had connection with her several times, the last time a night or two before she left for Liverpool;" meaning thereby that the plaintiff Margaret had been guilty of such immoral conduct as would prevent her being allowed and permitted to remain, become, or be a member of any Society and congregation of the sect aforesaid: and by means of the premises the plaintiff Margaret was not allowed or permitted to continue or be any longer a member of the Society and congregation aforesaid, and was turned

out of the same, and the leaders or elders of the Society refused to certify that the plaintiff Margaret was morally or otherwise fit to be a member of the sect or of any Society or congregation of the same; and *886] the plaintiff Margaret being desirous of becoming a *member of a Society and congregation of the sect in Liverpool, was not allowed or permitted or able to become a member of the Society in Liverpool, and was prevented from attending religious worship; and by means of the premises the plaintiff Margaret became and was greatly injured in her good name and reputation, and became sick and ill and greatly distressed in body and mind. Averment. That, by means of the premises, the plaintiff Robert Roberts had been put to and incurred great expenses in and about nursing the plaintiff Margaret and endeavouring to get her cured from her sickness, illness and distress of mind, and had sustained divers other injuries and damages. And the plaintiffs claimed 500*l*.

Demurrer, and joinder.

17 *McIntyre*, for the defendant.—The words in the declaration are not actionable without special damage: *Allsop and Wife v. Allsop*, 5 H. & N. 584; *Lynch v. Knight and Wife*, in error, 9 H. L. C. 577. In the written judgment prepared by Lord Campbell, in the latter case, (a) the following passage occurs, p. 593, “I may lament the unsatisfactory state of our law, according to which the imputation by words, however gross, on an occasion, however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special damage to her; but I am here only to declare the law.”

And no special damage is alleged sufficient to render the words actionable by reason of such damage. The allegation that the plaintiff Margaret was injured in her good name and reputation, and became sick and ill and distressed in body and mind, is not sufficient: *Allsop and Wife v. Allsop*. [*Crompton Hutton*, contra.—That *is admitted.] *887] The remaining head of special damage, that she was not allowed to continue a member of the Society and congregation of Calvinistic Methodists and was prevented from attending religious worship, is not temporal or pecuniary damage. The first part amounts to no more than that she was excluded from associating with particular persons: it is not alleged that she was a teacher in the Society and congregation, or that she derived any special advantage from being a member of it. As to the other part, the elders could not prevent her from attending the chapel. In *Bateman and Wife v. Lyall and Wife*, 7 C. B. N. S. 638 (E. C. L. R. vol. 97), there was an allegation of loss of customers by the husband in his business in consequence of the words spoken of his wife by the female defendant.

Crompton Hutton, contra.—Sufficient special damage to the wife is shown for which the husband may maintain this action. If the special damage must be pecuniary, an action for slander of a wife never could be maintained, as the damage would be to the husband, not to the wife. An action will lie for words spoken by which a woman has lost her marriage: *Davis v. Gardiner*, 4 Co. 16 b. [BLACKBURN, J.—Marriage has always been considered a valuable consideration.] In *Lynch v. Knight and Wife*, 9 H. L. C. 577, the special damage relied upon was not the

(a) Lord Campbell died before judgment was given in that case, but the written judgment was read by Lord Brougham.

natural and probable consequence of the words spoken; but it was the opinion of Lord Campbell, at p. 589, that loss of consortium or conjugal society would give a cause of action to a wife as well as to a husband. [BLACKBURN, J.—Lord Cranworth, p. 595, was strongly *inclined [*388 to agree in that, though Lord Wensleydale was of a different opinion. CROMPTON, J.—The loss of consortium of the wife has always been considered a temporal damage in an action by the husband for criminal conversation.] In the present case there is a loss of something more than consortium vicinorum; the wife was a member of a religious Society and congregation, and as such entitled to a seat in the chapel belonging to that Society and congregation; but in consequence of the words spoken by the defendant she was turned out of it. [McIntyre.—It is not alleged that she was entitled to a seat in the chapel without payment. BLACKBURN, J.—Unless she has been deprived of something of pecuniary value it is difficult to distinguish the present case from that of slander of a chaste unmarried woman.] The Court will not extend that doctrine. Value is attached to social advantages and position of which the Court will take notice: the wife had a status as member of the Society and congregation which she has lost. [COCKBURN, C. J.—She had no other benefit from it except attending a congregational place of worship: and she may get that benefit whether she attends as a member of the Society or not.] A right to a seat in a church or chapel is an advantage of which the law will take notice. The reason why the loss of consortium vicinorum is not sufficient special damage is that the most capricious motives may deprive a person of it. [He referred to Com. Dig. *Action upon the Case for Defamation* (D. 30).]

McIntyre was not called upon to reply.

COCKBURN, C. J.—No cause of action is shown on this declaration, as it does not allege special damage sufficient to make the words spoken of the female *plaintiff actionable. It is admitted that the loss [*389 of consortium vicinorum is not sufficient; and I am of opinion that the loss by the female plaintiff of membership of this Society and congregation, which appears to have been constituted for religious or spiritual purposes, amounts at most to no more than the loss of the merely nominal distinction of being able to call herself a member of it. It does not appear that any real or material advantages attach to membership; such as loss of a seat in the chapel, or of the opportunity of attending Divine worship there. If by reason of the words spoken the female plaintiff had been excluded from the meetings for religious worship, or from anything substantial which by right attached to membership of the Society, I should be disposed to hold that it was sufficient special damage. I think that to prevent a woman whose character for chastity is assailed from bringing an action for the purpose of vindicating it is cruel; but, as the law at present stands, such an action is not maintainable unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. That is not shown in this declaration, and therefore I reluctantly hold that the demurrer is good. If upon further inquiry anything can be found amounting to such special damage as the law requires, the plaintiffs may have leave to amend their declaration.

CROMPTON, J.—On the last observation made by the Lord Chief Jus-

tice, I wish to remark that the amendment should be immediate, so that the cause may be tried at the coming Assizes.

I agree that the present case falls within the rule that the loss of *390] consortium vicinorum is not sufficient *special damage. Here is no loss of a temporal nature; or, if there be any, it is merely nominal. Though I wish the law were different in the case of words affecting the chastity of a woman, yet the line must be drawn somewhere between words which are and words which are not actionable; and, if we held that the action for slander could be supported by the allegation that the plaintiff had suffered some nominal special damage, we must apply that doctrine to all kinds of less disparaging words, and should thereby encourage actions which ought not to be brought, as for saying that a person did some disreputable act though not essentially criminal. My only doubt is, whether the being prevented from attending religious worship is sufficient special damage; but if it was conducted in a chapel the female plaintiff could not be prevented from attending and occupying a seat there; especially if she paid for her seat. We do not however know how that is: it is not even stated that this Society had a chapel. The special damage alleged is of a nominal nature, and therefore our judgment must be for the defendant.

BLACKBURN, J.—The law upon the subject of disparaging words spoken of other persons is not in a satisfactory state. For words written an action is maintainable, though possibly not more than one farthing damages could be obtained, whereas for words spoken imputing unchastity to a woman no action can be maintained unless special damage is shown; for which purpose there must be material injury to the interests of the person slandered. What is here alleged is no more than loss of the consortium vicinorum. Judgment for the defendant.

*391] *THE QUEEN, on the Prosecution of the Burial Board of CHRIST CHURCH GREAT WARLEY, v. The Overseers of SOUTH WEALD. [May 28.]

Consolidated chapelry.—Order in council.—Enrolment of boundaries in Chancery.—59 G. 3, c. 134, s. 6.—8 & 9 Vict. c. 70, s. 9.—Burial Board.—Vacancy.—Power of appointment.—15 & 16 Vict. c. 85, s. 12.—18 & 19 Vict. c. 128, s. 4.—Office.—Quo warranto.

1. A consolidated chapelry, formed by order in council, on the representation of the Church Building Commissioners, under stat. 8 & 9 Vict. c. 70, s. 9, the boundaries of which are set forth in the order, is duly constituted without enrolment of the name and description of the boundaries in Chancery, even supposing it rendered essential by the provisions of stat. 59 G. 3, c. 134, s. 6.

2. By stat. 15 & 16 Vict. c. 85, s. 12, vacancies in a Burial Board may be filled up "when and as the vestry shall think fit." By stat. 18 & 19 Vict. c. 128, s. 4, every vacancy shall be filled up by the vestry within one month after the vacancy; and, in case of neglect, "the vacancy may be filled up by the Burial Board." Held, per Cockburn, C. J., and Blackburn, J., Crompton, J., dubitante, that the vestry might fill up a vacancy in the Board at any time before the Burial Board did so, though not within one month after the vacancy.

3. On the 26th November, 1858, three vacancies occurred in the Burial Board of a consolidated chapelry formed under stat. 8 & 9 Vict. c. 70, none of which were filled up either by the vestry or the Board, until, on the 21st June, 1859, F. was appointed by the vestry to be a member of the Board. F. and two other members of the Board signed a certificate directing the overseers of S., one of the parishes a portion of which was included in the consolidated chapelry, to pay the proportion of the expenses incurred in respect of the burial ground

chargeable on that part of the parish of S. On mandamus to the overseers of S., commanding them to pay or raise the necessary sum: held, per Cockburn, C. J., and Blackburn, J., that F. was duly appointed, and therefore the certificate was valid; per Crompton, J., and Blackburn, J., that if *quo warranto* would lie for the office of a member of a Burial Board, as to which *quære*, the appointment of F. could not be questioned in this collateral proceeding, and then the certificate would be valid.

MANDAMUS to the overseers of the poor of the parish of South Weald, in the county of Essex. The writ recited that by an order in council, dated the 21st July, 1855, made upon a representation of the Commissioners for building new churches, certain contiguous portions of the parishes of Great Warley, Shenfield and South Weald, in the county of Essex, were united and formed into one consolidated chapelry for all ecclesiastical purposes for the consecrated church called *Christ Church, situate in the parish of Great Warley, under the power [*392 for such purpose contained in stat. 8 & 9 Vict. c. 70, and the consolidated chapelry was named The Consolidated Chapelry of Christ Church Great Warley. That banns of marriage, and the solemnization of marriages, churchings, and baptisms, had been duly authorized to be published and performed in the church. That the incumbent thereof became entitled for his own benefit to the whole of the fees arising from the performance of such offices without any reservation thereout, and that under and by virtue of the provisions of that Act, and of the several Acts incorporated therewith, and of stat. 19 & 20 Vict. c. 128, the district or consolidated chapelry became a separate and distinct parish for ecclesiastical purposes, and known as such by the name of The Parish of Christ Church Great Warley. That the parish of Christ Church Great Warley did not separately maintain its own poor, and had not heretofore had any separate burial ground. That from the period of the consecration of the church vestries or meetings in the nature of vestries had been held therein by the inhabitants of the parish of Christ Church Great Warley. That, under and by virtue of and according to the statutes concerning the burial of the dead, a vestry meeting was duly convened of the parish of Christ Church Great Warley, for the purpose of determining whether a burial ground should be provided for that parish, pursuant to the statutes, and that public notice of such vestry meeting, &c., was given in the usual manner seven days before holding such vestry meeting, and by which vestry, holden in pursuance of such notice, to wit, on the 17th November, 1857, it was resolved that a burial ground should be [*393 *provided under the statutes for the parish; and a copy of such resolution, extracted from the minutes of the vestry and signed by the chairman, was afterwards sent to one of the principal Secretaries of State pursuant to the statutes. That after such resolution the vestry appointed certain persons, being not less than three nor more than nine persons (naming them), and being ratepayers of the parish, to be and the same became and were the Burial Board of the parish pursuant to the statutes. That at a meeting of the vestry of the parish duly convened and held, and of which due notice was given, it was afterwards resolved by the vestry, according to the provisions of the statutes, that the Burial Board should be authorized to incur expenses to the amount of 1200*l.* in providing and laying out a burial ground under the burial Acts and building the necessary chapel or chapels thereon. That the Burial Board so appointed for the parish did, under the authority and

In accordance with the burial Acts, with the sanction of the vestry of the parish, and with the approval of the Commissioners of the Treasury, to wit, on the 25th October, 1859, borrow a sum of 1200*l.* for providing and laying out a burial ground under the burial Acts, and charged the repayment of the said sum of money and interest thereon by annual instalments upon the poor rates of such portions of the parishes of Great Warley, Shenfield and South Weald as are comprised within the parish of Christ Church Great Warley, and had purchased and laid out a burial ground and erected a chapel and lodge thereon, which burial ground, except so much thereof as was set apart to remain unconsecrated, and a chapel thereon, with the approval of the Secretary of State, were, *394] to wit, on 1st September, *1860, duly consecrated by the bishop of the diocese, and the burial ground from the time of the consecration has been used as the burial ground for the parish of Christ Church Great Warley. That, by a certificate under the hands of the Rev. T. H. Bunbury and E. M. Daldy and F. Francis, being members of the Burial Board and duly authorized to exercise its powers, they, on the 29th January, 1861, certified that the sum of 149*l.* 10*s.* had been incurred by the Burial Board for the parish of Christ Church Great Warley, in carrying into execution the several Acts relating to burials beyond the Metropolis, and thereby authorized and directed the overseers of the poor of the parish of South Weald to pay the sum of 53*l.* 15*s.*, being the proportion of such sum of 149*l.* 10*s.* chargeable upon that part of the parish of Christ Church Great Warley which is comprised within the parish of South Weald, to the treasurers of the Burial Board for and on behalf of the Board. That the overseers have levied and collected from the parishioners of that part of the parish of South Weald which is comprised within the parish of Christ Church Great Warley a separate rate for the purpose of paying the sum of 53*l.* 15*s.* so certified and directed to be paid: Yet the defendants, well knowing the premises, and having paid the sum of 40*l.*, parcel of the sum of 53*l.* 15*s.* so certified and directed to be paid, but not regarding their duty in that behalf, declined and refused to pay the balance of the sum of 53*l.* 15*s.*, to wit, the sum of 13*l.* 15*s.*, parcel of the said sum, to the treasurers of the Burial Board for the parish of Christ Church Great Warley, according to the certificate, or to make and levy a rate for that purpose. The *395] writ commanded the defendants to pay, or, if necessary, raise the *sum of 13*l.* 15*s.* to pay to the treasurers of the Burial Board for the parish of Christ Church Great Warley, according to the certificate made by the Board requiring such payment, pursuant to the provisions of stats. 15 & 16 Vict. c. 85, 18 & 19 Vict. c. 128, and 20 & 21 Vict. c. 81.

Return. That the consolidated chapelry of Christ Church Great Warley is alleged to have been made and created by the Commissioners for ecclesiastical purposes under and by virtue of stat. 8 & 9 Vict. c. 70, and also by virtue of an order in council. That the 6th section of stat. 59 G. 3, c. 134, and the 9th section of stat. 8 & 9 Vict. c. 70, enact and explain and declare the manner in which such consolidated chapelries are to be created and made, and all things necessary to be done to make, constitute, and create the same. Yet the Commissioners did not do all things necessary, nor did they satisfy the requirements of the said sections, in order to constitute the said consolidated chapelry, in this, that

they did not cause such district to be named, ascertained, and marked out by described bounds, and such name and the description of such bounds, when approved by Her Majesty in council, to be enrolled in the High Court of Chancery. That the said consolidated chapelry has never been duly created or made, and that the part of the parish of South Weald alleged to be included therein is still a portion of the parish of South Weald, and not legally separated therefrom. That the incumbent of the said consolidated chapelry is not, nor has he ever been, entitled for his own benefit to the entire fees arising from the performance of the offices specified in the 14th section of stat. 19 & 20 Vict. c. 104, without any reservation *thereout. That the said con- [*396 solidated chapelry is not, nor ever was, a separate and distinct parish for ecclesiastical purposes. That the said consolidated chapelry or district, never having been a separate and distinct parish or place, or separately maintaining its own poor, and that part of the parish of South Weald, included therein, never having been separated from the parish, the inhabitants or vestry of the consolidated chapelry had no power to act under the statutes concerning the burial of the dead, or to appoint and elect a Burial Board, or to exercise any of the powers or provisions, or to put in force within the said consolidated chapelry any of the statutes concerning the burial of the dead. That the certificate was not signed by three members of the Burial Board duly authorized to exercise the powers thereof, for that F. Francis, being one of the three alleged members purporting to sign the same, was not a member of the Board at the time of his signing the said certificate, and consequently the certificate was bad and illegal.

Plea, affirming the averments negatived in the return:

The defendants joined issue thereon.

On the trial, before Channell, B., at the Summer Assizes for the county of Essex, 1863, a verdict was found for the Crown by consent, subject to the following case.

The consolidated chapelry of Christ Church Great Warley contains parts of the parishes of Great Warley, Shenfield, and South Weald, in the county of Essex (which parishes are contiguous to each other), and is situate in the diocese of Rochester. A population being collected together in the chapelry in the extremities of and locally situate in the parishes so contiguous to each other at a distance from the respective churches of those parishes, *and there being a consecrated church [*397 in the chapelry and in one of the parishes, Her Majesty's Commissioners for building new churches, with the consent of the Bishop of Rochester, signified under his hand and seal, and with the consents also in like manner signified of the Bishop as patron in right of his see of the vicarage and parish church of the parish of South Weald, of Earl de Grey, patron of the parish church of the parish of Shenfield, and of the Master, Fellows, and Scholars of the College of St. John the Evangelist, in the University of Cambridge, patrons of the parish church of the parish of Great Warley, represented to Her Majesty in council the expediency of uniting the contiguous parts of the parishes into one consolidated chapelry for the said church with respect to all ecclesiastical purposes, which representation, with the said consents, was made and dated the 27th June, 1855. (A copy was annexed.)

South Weald is a vicarage, and the Bishop of Rochester, in right

of his see, is sole patron of the parish, and is the sole patron of the parish church. Mr. Tower, before and at the date of the said order, was and still is the lay impropriator of the parish of South Weald. His consent was not asked for or obtained to the formation of the district chapelry, and he has never assented thereto.

The description of the boundaries contained in the representation is correct, and the statements in the representation contained are in every respect true.

On the 21st July, 1855, Her Majesty in council on the said representation ordered the consolidated chapelry to be so formed. (A copy of the order in council was annexed.)

*398] *A copy of the order in council approving the representation, and of the plan or map thereunto annexed, was, on the 28th July, 1855, registered in the Registry of the Diocese of Rochester, but neither the representation, map, or plan, or order, or the name of such district, or the description of the bounds thereof when the same had been approved by Her Majesty in council, were, nor was any of them, ever enrolled in the High Court of Chancery, nor, save as appears by this case, did the Ecclesiastical Commissioners ever cause the aforesaid district to be named, ascertained, and marked out by described bounds, nor, save as aforesaid, was the same ever done. The order in council was duly inserted and published in The London Gazette on the 27th July, 1855.

On the 6th October, 1857, the Rev. Hastings Robinson, D.D., then being rector of the parish of Great Warley, the Rev. Charles Almeric Belli, then being vicar of the parish of South Weald, and the Rev. Charles Isaac Yorke, then being rector of the parish of Shenfield, by a document (a copy of which was annexed), duly signed by them, voluntarily relinquished, so far as by such document they lawfully could, in favour of the incumbent for the time being of the consolidated chapelry of Christ Church Great Warley, all fees arising from marriages, christenings, churchings, and burials performed in the church of the consolidated chapelry.

No release or relinquishment was ever in fact executed by the aforesaid three clergymen, and the defendants contended that the alleged relinquishment was wholly inoperative.

The incumbent of the consolidated chapelry has from thence hitherto, *399] by virtue of the said relinquishment, *received for his own use and benefit the entire fees arising from the performance of the said offices in the church of the consolidated chapelry, without any reservation thereof. Continually since the order in council was made, banns of matrimony, and the solemnization of marriages, churchings, and baptisms, according to the laws and canons in force in this realm, have been duly authorized to be and have been published and performed in the said church.

The certificate in the writ of mandamus mentioned was signed by T. H. Bunbury, E. M. Daldy and F. Francis, on the 29th January, 1861. (A copy accompanied the case.) Such certificate was duly served on and received by the defendants on the 6th February, 1861.

T. H. Bunbury and E. M. Daldy, at the time of signing the certificate, were in all respects members of the Burial Board, and duly authorized to exercise the powers of members of the Board.

In pursuance of the provisions of the Burial Acts, the Board by resolution fixed the 26th November in each year as the time for one-third of its members to retire. Such resolution remaining in force on the 26th November, 1858, three vacancies occurred, none of which were filled up, either by the parish or the Board, until, on the 21st June, 1859, F. Francis was appointed by the vestry of the parish of Christ Church Great Warley to be a member of the Board. F. Francis was, at the time of the election, and has been continually since, a ratepayer of the parish, and duly qualified to be a member of the Board, but has never been elected to be a member of the Board otherwise than as before set forth.

F. Francis has since his election continually acted as a member of the Board.

*No objection was made to the election of F. Francis at the vestry, nor within seven days after the holding thereof, nor at [*400 any other time.

The defendants on the 21st December, 1861, paid 40*l.*, part of the sum of 53*l.* 15*s.* mentioned in the certificate, and as directed thereby, but neglected and refused to pay the remainder thereof as directed by the certificate, although they had sufficient money in their hands arising from the poor rates of the parish of South Weald, and applicable for that purpose.

The said district or consolidated chapelry has not at any time maintained its own poor, and the overseers of the poor were always the proper persons to make and collect the poor rate for the parish of South Weald.

The Burial Board have assumed to act and acted as a Burial Board from the 26th November, 1857, till the present time.

The documents herein referred to were respectively signed, sealed and executed as they purport respectively to have been, and the facts referred to and recited therein are true, except as may herein appear.

The Court was to be at liberty to draw any inferences or find any facts which in their opinion a jury ought to have drawn or found.

The defendants at the trial contended that they were not bound or liable to pay, as directed by the certificate, the sum of 13*l.* 15*s.*, on the following grounds.

That the consolidated chapelry was not duly constituted.

That the provisions of the Burial Acts did not apply to the consolidated chapelry, and could not be put in exercise therein.

That the Burial Board never was duly and legally formed.

*That F. Francis was not duly elected a member of the Burial Board; and [*401

That the certificate was not a valid certificate in point of law.

The question for the opinion of the Court was, whether, on the facts appearing on this case and to be properly inferred therefrom, and having reference to the objections raised, the defendants were entitled to a verdict on any or either and which of the issues joined, and the verdict and judgment were to be entered in conformity with the direction of the Court.

Petersdorff, Serjt., for the prosecutor. — First. The consolidated chapelry was legally created. Stat. 59 G. 3, c. 134, s. 6, empowers the Church Building Commissioners to unite and consolidate contiguous

parts of parishes into a separate and distinct district for all ecclesiastical purposes, and to cause such district to be named, ascertained and marked out by described bounds, "and such name, and the description of such bounds, when approved by His Majesty in council, to be enrolled in the High Court of Chancery, and in the office of the registry of the diocese to which such district shall belong, under the provisions of this Act." This enactment as to the enrolment in the Court of Chancery is directory only. But, if it be otherwise, stat. 8 & 9 Vict. c. 70, s. 9, which recites that "it is expedient to explain and amend the provisions" of the former statute, empowers the Commissioners, with the consent of the Bishop of the diocese, &c., to represent to Her Majesty in council the expediency of uniting contiguous parts of parishes, &c., into one consolidated chapelry for the church of one of those parishes with respect *402] to all ecclesiastical purposes, "and such representation shall contain a description of such boundaries as may appear advisable to Her Majesty's said Commissioners for such consolidated chapelry, and shall state to what corporate body, aggregate or sole, or person, their or his successors, heirs, and assigns, the right of presentation and appointment to the church of such consolidated chapelry is proposed, with such consents as aforesaid, and with the approval of the said Commissioners, to belong; and if thereupon Her Majesty in council shall think fit to order such consolidated chapelry to be so formed, such order shall be good and valid for the purpose of forming the same." The later enactment, which is a substitution for the former, does not require the description of the boundaries to be enrolled in the Court of Chancery.

Secondly. The provisions of the Burial Acts apply to a consolidated chapelry formed under stat. 8 & 9 Vict. c. 70. [*Gray, contra.*—The defendants do not rely on that point.]

Thirdly. The Burial Board was duly and legally formed, and the certificate was valid. The objection raised is that Francis, one of the three members of the Board by whom the certificate was signed, was not duly elected, having been appointed by the vestry and not by the Burial Board. By sect. 11 of The Metropolitan Burial Act, 15 & 16 Vict. c. 85, the enactments of which are extended beyond the Metropolis by stat. 16 & 17 Vict. c. 134, s. 7, the vestry are to appoint a Burial Board of not less than three ratepayers, one-third to retire annually. And by sect. 12 "Any vacancies in the Board may be filled up by the vestry when and as the vestry shall think fit." By stat. 18 & 19 *403] Vict. c. 128, *s. 4, "Every vacancy in any Burial Board shall be filled up by the vestry appointing the same within one month after such vacancy shall have happened, and immediately on the occurrence thereof the same shall be notified by the Burial Board to the churchwardens or other persons to whom it belongs to convene meetings of the vestry; and in case any such vestry shall neglect to fill up any such vacancy, the vacancy may be filled up by the Burial Board at any meeting thereof." That section does not take away the right of the vestry under stat. 15 & 16 Vict. c. 85, s. 12, to appoint after the month has elapsed, if the Burial Board do not exercise their power of filling up the vacancy. Further, this is at most a defect, irregularity, or error in form in the proceedings of the vestry, and as such is cured by stat. 20 & 21 Vict. c. 81, s. 27. [*COCKBURN, C. J.*—The appointment of Francis by the vestry, if not warranted by the statute, was *ultra vires*.]

Gray (with him *Woollett* and *Philbrick*), contra.—First. Stat. 8 & 9 Vict. c. 70, s. 9, being an amendment of stat. 59 G. 3, c. 134, s. 6, must be read with it, not in substitution for it. Therefore enrolment of the description of the boundaries is still necessary and the order in council inoperative for want of it: *Crossley v. Arkwright*, 2 T. R. 603. [COCKBURN, C. J.—The whole machinery is changed by stat. 8 & 9 Vict. c. 70, s. 9, which takes the power out of the Commissioners and vests it in the Queen in council; and therefore stat. 59 G. 3, c. 134, s. 6, is virtually repealed. Moreover, as the boundaries are set forth in the order of council, an enrolment of the description of them is no longer necessary.]

*Thirdly. By stat. 18 & 19 Vict. c. 128, s. 4, the power of the vestry, if not exercised within a month, is gone, and vested [*404 in the Burial Board: the word “may” is to be construed “shall,” and imposes the duty of filling up the vacancy on the Burial Board; otherwise there would be at the same time two bodies, either of whom might make the appointment. [BLACKBURN, J.—There is an analogy in the case of ecclesiastical patronage. COCKBURN, C. J.—If this were a privilege of an individual to be exercised within a limited time, after the lapse of that time it might become the duty of the public body to exercise it; but stat. 18 & 19 Vict. c. 128, s. 4, does not take away the duty or power of the vestry to appoint.] Would the Court, after the month had elapsed, direct a mandamus to the vestry to fill up the vacancy? [COCKBURN, C. J.—We should direct the writ to the body on whom it was compulsory to fill up the vacancy. BLACKBURN, J.—Assuming the appointment of Francis invalid he was de facto a member of the Burial Board, and if this is an office for which quo warranto would lie when tried by the rule laid down in *Darley v. The Queen*, 12 Cl. & F. 520, he must be removed by quo warranto. CROMPTON, J.—The acts of a person de facto in such an office are good.]

Petersdorff, Serjt., was not called upon to reply.

COCKBURN, C. J.—We have during the argument determined the first point; namely, that the enrolment of the boundaries of the chapelry in the Court of Chancery is not necessary since stat. 8 & 9 Vict. c. 70, s. 9.

As to the second point, I am of opinion that Francis is properly a member of the Burial Board, and *therefore the certificate is valid. Reading stats. 15 & 16 Vict. c. 85, s. 11, and 18 & 19 [*405 Vict. c. 128, s. 4, together, it appears that whereas, under the first enactment, the vestry had an unlimited time for filling up a vacancy in the Board, the second is a proviso upon that, and enacts that they shall fill up the vacancy within a month, and casts on them the obligation and duty of doing it; but, in the event of their not discharging their duty, “the vacancy may be filled up by the Burial Board.” Mr. *Gray* calls upon us to read “may” as “shall;” as has been done in some statutes when it was manifest from the context and other provisions that such was the intention of the Legislature; but it is a strong thing to do so when both these words occur, as here, in the same section. It was intended that it should not be necessary to come to this Court for a mandamus if the vestry do not fill up the vacancy in due time; for then the Burial Board may do it. But if the Burial Board do not exercise the power conferred on them, the duty and power of the vestry

to elect is not taken away: it still remains obligatory on them to discharge that duty. If both bodies exercised this power at the same moment of time there might be a difficulty as to which election should prevail: inasmuch as stat. 18 & 19 Vict. c. 128, s. 4, gives the right to the Burial Board in case of default by the vestry, it may be that the appointment of the former should be preferred as against the latter. But it is unnecessary to decide that question in the present case, for the Burial Board did not appoint.

CROMPTON, J.—On the main question I have not the least doubt.
 *406] When a consolidated chapelry is formed *under stat. 8 & 9 Vict. c. 70, s. 9, a new mode of accomplishing that object is provided.

On the other point I am not free from doubt. Mr. *Gray's* argument made some impression on my mind, but I do not dissent from the view of the Lord Chief Justice and my brother Blackburn. Stat. 15 & 16 Vict. c. 85, s. 12, empowers the vestry to fill up vacancies in the Burial Board “when and as they shall think fit:” it is not imperative that they shall fill them up within a particular time. Stat. 18 & 19 Vict. c. 128, s. 4, says that they shall fill up every vacancy within a month, and in case they neglect gives the power to the Burial Board, by which it seems to have been intended to provide an easier remedy than mandamus in case the vestry neglected their duty. That is strengthened by the observation of the Lord Chief Justice as to the words “shall” and “may” being both used in the same section. There is, however, a good deal in Mr. *Gray's* argument on the inconvenience of two bodies having the same power which might be exercised at the same time. And I do not know any case in which it is discretionary in a public body to exercise a power of appointment given to them. It may be that, the second Act being an amendment of the former, the Legislature thought that they must put a restriction on the time within which the power should be exercised by the vestry, otherwise the appointment shall go over to the Burial Board. I think the construction is open to considerable doubt. But then, wherever quo warranto lies, the title to an office cannot be impeached in a collateral proceeding; and I should wish to ascertain whether it would lie for this office. The principle that the acts of persons de facto in office are good for collateral purposes is a
 *407] *useful one and ought not to be narrowed; and therefore, if my doubt on the construction of the statutes is well founded, the case for the defendants is not made out, because Francis is de facto in office, and his title not being impeachable in this proceeding the certificate is good.

COCKBURN, J.—I express no opinion on the latter point.

BLACKBURN, J.—I agree with the rest of the Court on the first question.

On the second question I read stat. 18 & 19 Vict. c. 128, s. 4, as a proviso on the unlimited power of filling up vacancies given to the vestry by stat. 15 & 16 Vict. c. 85, s. 12, and as providing that they shall fill them up within a month, and that, if they neglect, the Burial Board may appoint, thus avoiding the necessity of applying for a mandamus to the vestry. The later enactment does not say that the vestry shall not fill up a vacancy after the month. In that view, Francis was rightfully in possession of the office, and therefore the other question does not arise.

I do not throw any doubt on the very convenient doctrine that the

title of a person in office de facto cannot be questioned in a collateral proceeding. But without further research and further argument I express no opinion on the question whether this is an office for which quo warranto will lie.

Judgment for the Crown.

IN THE EXCHEQUER CHAMBER.

THE QUEEN v. THE BOARD OF WORKS FOR THE STRAND DISTRICT. *May 11.*

Reported 4 B. & S. 551 (E. C. L. R. vol. 116).

CARR and JOSLING v. Sir MOSES MONTEFIORE, Bart.
May 11.

Marine Insurance.—Construction of policy.—Constructive reloading.—Concealment of material facts.

1. Policies of insurance are to be construed according to the same rules as all other written contracts, namely, by ascertaining the intention of the parties, to be gathered in the first instance from the words of the instrument, but interpreted, if necessary, by the surrounding circumstances. By the Exchequer Chamber, affirming the decision of the Queen's Bench.

2. A policy of insurance was effected on the ship "Dos Hermanos" and her cargo "at and from port or ports in the river Plate to the United Kingdom," &c., "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at as above;" the insurance being effected to protect the interest of the owners resident in the river Plate. The cargo had been shipped in Patagonia on board the ship, then bearing another name, destined for England. She arrived at Monte Video in the river Plate in a damaged state, and a portion of her cargo was taken out for the purpose of repairing her, and then reloaded. On being repaired, she and her cargo were purchased by parties at Monte Video, who changed her name, and the above insurance was afterwards effected. An average loss of the ship and cargo having taken place: held that the underwriters were liable. *Id.*

3. *Quære*, by the Court of Queen's Bench, of the doctrine in *Boyd v. Dubois*, 3 Campb. 133, that if goods which are insured are put on board a ship in a state likely to take fire, and they are consumed by some other cause, the policy is not vitiated by the fact of the state of the goods not having been disclosed to the underwriters.

THIS was an action brought by the plaintiffs against the defendant, the chairman of The Alliance Marine *Insurance Company, sued [*409 under an Act of Parliament as representing the Company.

The first count of the declaration was on a policy of insurance, dated the 4th December, 1857, "at and from port or ports in the river Plate to the United Kingdom, with leave to call at a port and wait for orders," and which was on the ship "Dos Hermanos," and her cargo, valued, 750*l.* on the ship, 1750*l.* on guano; "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at as above:" with the following clause, "It is understood that this insurance has been effected to protect the interest of the owners who reside in the river Plate." The count alleged that the ship with her cargo departed from the port of Monte Video in the river Plate, on her voyage, and in consequence of tempestuous weather it became absolutely necessary for the preservation of the ship and goods to proceed to a port

of safety, namely, the harbour of Maranham, in Brazil; that she was there found unseaworthy and unfit to prosecute her voyage without great repairs, and that it became expedient and necessary to abandon the voyage and sell the ship and goods, whereby they became wholly lost to the persons interested.

There was also a common money count.

Pleas. First. To the first count: that it did not become and was not absolutely necessary for the ship to proceed to the harbour of Maranham, and that it did not become expedient and necessary to abandon the voyage and to sell the ship and the goods, &c., and that no notice of abandonment was given to the Company, and that the vessel and goods, &c., were not necessarily sold, and were not lost.

*410] Second. To the same: that the ship was, at the *time of her departure for the voyage, unseaworthy for the voyage.

Third. To the same: that certain facts which were at the time of the making of the policy material to the risks of the policy and material to be known to the Company, and which the plaintiffs and the persons alleged to be interested in the ship and goods and their agents, before and at the time of the making of the policy, well knew, and of which the Company was then ignorant, were wrongfully and improperly concealed from and not communicated to the Company, to wit, that shortly before the ship departed from Monte Video, as alleged, the ship, being then called and known by the name of The James N. Cooper, had been damaged and injured, and had become and was wholly unseaworthy, and her cargo, which had been loaded on board the ship at a port or ports not being a port or ports in the river Plate, to wit, in Patagonia, had been, whilst on board the ship, wetted, spoiled, damaged, injured and deteriorated in quality and value, and a great part of the cargo had been, after having been so wetted, spoiled, damaged, injured and deteriorated as aforesaid, unshipped from and reloaded on board the ship whilst the ship was at Monte Video; and that after all the above-mentioned occurrences had taken place, and before the departure of the ship from Monte Video as alleged, the name of the ship had been changed into the name of The Dos Hermanos, in which name the ship was insured as alleged; and that, by reason of the ship so being insured in the name of The Dos Hermanos, the Company did not and could not ascertain before the making of the policy, as they otherwise could and would have done, the aforesaid facts so wrongfully and improperly concealed as aforesaid.

*411] Fourth. As to so much of the first count as related to *the plaintiffs' claim in respect of the goods: that the goods were not shipped on board the ship at any port or ports in the river Plate.

Fifth. To the money count, payment into Court.

Replication. The plaintiff took issue on the first four pleas, and under the fifth took the money out of Court.

He likewise demurred to the fourth plea.

Issue on the first four pleas, and joinder in demurrer on the fourth.

The issues in fact were tried at the Spring Assizes in 1863 for the Southern Division of the county of Lancaster, when a verdict was returned for the plaintiffs, with leave reserved to the defendant to move the Court.

In Easter Term, 1863, a rule nisi was granted to enter a nonsuit or

reduce the damages, on the grounds that material information known to the assured was not communicated to the insurers, and that the ship did not sail on her voyage, nor were the goods loaded on board at Monte Video: with liberty to the parties to consent to a special case being stated on the facts and questions raised at the trial.

The following special case was stated accordingly:—

In August, 1857, the ship insured, then called *The James N. Cooper*, an American vessel, arrived sea damaged in the port of Monte Video, having on board a cargo of about 800 tons of guano, which she had shipped at Liones Island, in Patagonia, destined for England. There was a leak under the cutwater knees on the port side of the vessel. The two upper breasthooks and the cutwater knees and some wood ends and seams had started. The water had gone on top of the guano, a small portion of which near the bows was moist. The rest of the cargo as far as could be ascertained was in good condition. A witness, called *Guerrez, stated that the cargo was examined, and was found in [*412 a sound state.

For the purpose of repairing the vessel the cargo in the fore peak down to the keelson was taken out of her, but the rest of the cargo was not moved. The ship then underwent thorough repairs, and the portion of the cargo which had been discharged was reloaded on board.

In the early part of September, the vessel having been repaired, she and her cargo were put up for sale by the respective owners thereof, and were purchased at Monte Video by the firm of Da Costa, Brothers, of Monte Video, who, not being American citizens, could not sail the ship under the American flag, and they therefore substituted the Oriental flag for the American, and renamed the ship *The Dos Hermanos*.

Before purchasing the ship she was surveyed by one Sloan, a ship carpenter, by order of Messrs. Da Costa, and the damage which she had suffered was ascertained.

The injuries to the ship were thoroughly repaired before the vessel left Monte Video.

Messrs. Da Costa determined to send *The Dos Hermanos* and her cargo to England, and it was arranged that the Messrs. Jacobs & Co., bankers and money brokers (also of Monte Video), should advance to Messrs. Da Costa a sum of 4000*l.*; and that the ship and cargo should be consigned to Messrs. Carr, Josling & Co., of London (the plaintiffs), who were the London agents of Jacobs & Co., and the 4000*l.* repaid out of the proceeds of the cargo and ship, if requisite, in England.

In pursuance of this arrangement Jacobs & Co. handed to Da Costa & Co. their drafts in four bills of exchange for 1000*l.* each upon Carr, Josling & Co., and *received the bills of lading for the cargo, [*413 and the following letter:—

“Messrs. Jacobs & Co.,

“Gentlemen,

“Buenos Ayres, 1st October, 1857.

“We enclose the bills of lading of the cargo of the Oriental ship *Dos Hermanos*, consisting of 800 tons of guano, with the necessary certificate of the American Consul, that you may have the goodness to provide the insurances in London of the said vessel and cargo. For our part we rely that you will do all that is possible to carry out this with that promptitude which characterizes you, &c.,

“pr pro Germano Da Costa & Co.,

“J. FENN.”

The certificate referred to was in the following terms:—

“R. M. Hamilton, Esq.,

“U. S. Consul.

“Monte Video, 1st September, 1857.

“Sir. According to your official request, we, the undersigned, repaired on board the ship James N. Cooper, and, after carefully surveying her, have to report that we found the repairs necessary fully executed, and we consider said ship to be in a perfect seaworthy condition.

“EBEN HARDEN,

“Master of bark Lillias.

“T. B. CARVER,

“Master of bark Trovatora.

“JOHN SLOAN,

“Master ship carpenter.”

“Sworn before me,

“R. M. HAMILTON,

“U. S. Consul.”

The case here set out the original bill of lading in Spanish. The following is a translation:—

*414] “I, Luis Ansaldo, captain of the Oriental ship Dos Hermanos, at present anchored in this port of Monte Video, bound to port in England, acknowledge to have received and loaded in this ship under deck and in good condition from Messrs. Germano Da Costa & Brothers, for account and risk of whom it may concern, 800 tons of Patagonian guano (of or from Patagonia), all of which I bind myself to deliver dry and in good condition, marked and numbered as in margin, in the said port of England, excepting the risks and perils of the sea, to Messrs. Carr, Josling & Co., or to their order, paying me the freight, to which effect I pledge my person and my goods, together with my said vessel, freight, and appurtenances. In faith of which I sign four bills of lading of the same tenor, the one being accomplished the others to be without value.

“Monte Video, 29th September, 1857.

“LUIS ANSALDO.”

On the same day (October 1st) Messrs. Jacobs & Co. wrote to Carr, Josling & Co. in the following terms:—

“Dear Sirs,

“Buenos Ayres, 1st October, 1857.

“We have now the pleasure to wait upon you with the bills of lading of a cargo of guano forwarded by our friends, Messrs. Germano Da Costa & Irmao to your consignment. This vessel, The Dos Hermanos, will sail from Monte Video for Cork or Falmouth for orders to any port in the United Kingdom, and we trust you may be able to effect a sale previous to her arrival.

“Messrs. Germano Da Costa & Irmao will address you direct in regard to their wishes for the sale of both cargo and ship, and we trust you may have no difficulty in carrying out their instructions.

*415] “The vessel was originally The J. N. Cooper, an American barque of 549 tons, and in consequence of repairs and disputes had to be sold in Monte Video, and in order to assist you in effecting insurance we enclose you the certificate from the American consulate at Monte Video that she is in a seaworthy condition. We shall be obliged by your effecting an insurance on the vessel and cargo for the sum of 10,000*l.* on the best terms.

“We remain, dear sirs, your obedient servants,

“JACOBS & Co.”

The above documents, with the bills of exchange for 4000*l.*, arrived in England, and the bills were accepted by the drawees. Afterwards, and on or about the 27th November, 1857, Mr. William Wanklyn, a brother of one of the members of the firm of Jacobs & Co., and who carried on business at Manchester and Bury, received information from Carr, Josling & Co. that they had suspended payment, and that Jacobs & Co. were interested in their stoppage.

At the trial Mr. Wanklyn was called as a witness, and stated as follows:—

“ I carry on business at Manchester and Bury. I had a brother in business at Monte Video and Buenos Ayres. The name of the house was Jacobs & Co. On the 27th November, 1857, I received an intimation from Carr, Josling & Co. that they had suspended payment. I was informed by them that Jacobs & Co. were interested in their stoppage. I went up to London immediately. I ascertained that the value of the ship and cargo was 3000*l.* to 4000*l.* more than the amount of their bills. I learned from Carr, Josling & Co. that they had accepted the bills, but could not meet them. Great loss would have been caused if the bills had been *returned. Carr, Josling & Co. handed to me the letter of the 1st October, 1857, from Jacobs & Co. of Buenos Ayres, to Carr, Josling & Co. They told me they had not effected any insurance. They gave me the letter and also the certificate of the seaworthiness above set out, and showed me the bills of lading. They did not give me the bills of lading then. I brought away with me the letter and certificate of the seaworthiness. I observed that the bill of lading was 800 tons of guano from Patagonia. There is no guano at Monte Video. They did not then give me the bills of lading. I afterwards gave an undertaking to pay the bill, and they gave me the bills of lading. I went with the letter and the certificate to effect an insurance. I went to Mr. Poole, the insurance broker. I told him the whole circumstances. He was a member of the committee and one of the oldest members of Lloyd's. I considered that the insurance ought to be 5000*l.* to cover all. Mr. Poole took me to the Royal Exchange office. Mr. Warre is manager for the Royal Exchange. Mr. Poole said, ‘ Here is Mr. Wanklyn, he wishes you to do an insurance. His brother has advanced 4000*l.* upon a vessel and cargo, and has drawn upon his agents, Carr, Josling & Co., for the amount. They have stopped payment, and Mr. Wanklyn is anxious to protect his brother, and he will take up the bills for Jacobs & Co. (his brother's) house if he can get the vessel and cargo insured so as to cover him.’ Mr. Warre said, ‘ What is she?’ Mr. Poole said, ‘ She is an American vessel, and was The J. N. Cooper, but has been sold to some Spaniards in Monte Video, after being repaired there, and they changed her name. She is now called The Dos Hermanos. It was said she was sold in consequence of want of repairs and disputes. Mr. Warre said, ‘ We *have had her offered to us. [*416 We did not like her.’ I said, ‘ We have a certificate of seaworthiness of the vessel and this letter.’ I had the letter in my hand at the time. I handed them to Mr. Warre. I said the orders were to insure for a much larger amount, but my intention was to insure to protect the bills, I mentioned I wanted 5000*l.* Mr. Warre certainly looked at the documents. I believe he read them. He had them in his hands and handed them back to me. Mr. Warre asked, ‘ Was the vessel loaded

at Monte Video?" Mr. Poole said, "Of course, she brought the cargo from Patagonia; there is no guano at Monte Video." I said I can't tell, but she had been repaired there, and I should say some portion had been taken out, but I know nothing for certainty. All I know is, my brother has advanced 4000*l.* upon the ship and cargo; that she left Monte Video about the end of October, and ought to be more than half-way here. I have been at Monte Video, and spoke from experience. After a pause Mr. Warre said, "We will do half the amount at ten guineas." I said it was an enormous premium. Mr. Poole said, "I do not think you will get it at less." I said, "very well," and Mr. Warre took the risk. I and Mr. Poole went direct to the Alliance from the one office to the other. We saw Mr. Gabb, the manager. Mr. Poole introduced me as one of the firm of Bradshaw, Wanklyn & Co., of Manchester. I made the same statement substantially to him. I gave Mr. Gabb the letter. He passed it to a gentleman who sat beside him. The gentleman to whom the letter was handed came and whispered something to Mr. Gabb. Mr. Gabb said, "Upon whose account is the insurance to be effected?" I said I suppose on account of Jacobs & Co.; *418] they hold the ship and cargo *to secure themselves. Mr. Gabb said, "Then it had better be put upon the face of the policy." My impression is that Mr. Poole passed them a slip of paper, saying that the Exchange had done one-half; he wished them to do the other, and then Mr. Wanklyn would be satisfied he had done all he could for his brother. We paid the Alliance the same premium, ten guineas. I got both policies and paid the bills. They are here in Court. The ship, I heard, was abandoned at Maranham, and was sold and broken up. I sent the papers immediately to the offices."

Cross-examined. "I had no other information but the certificate and letter. The letter had just arrived to Carr & Josling. I am quite positive I only saw this one letter then. I saw this letter also (being the letter of the 1st October, 1857, from Da Costa to Jacobs & Co.) I had not been informed that the ship had met severe weather in coming to Monte Video. All I knew was what is in the letter and the certificate. I have a perfect recollection of all the circumstances."

Mr. John Poole was also called and stated. "I have been at Lloyd's fifty years. I have heard the evidence of the last witness. The account he has given is correct as relates to my knowledge. I am certain that both certificate and letter were shown at both offices." [It was agreed at the trial, and was to be taken that what occurred at the offices was as stated by Mr. Wanklyn.]

A facsimile of the policy, as drawn up by The Alliance Marine Insurance Company, was annexed to and formed part of the case.

The vessel with the cargo left Monte Video for England on the 21st October, 1857, and in the course of her voyage she encountered very *419] heavy weather, and *both ship and cargo suffered sea-damage, which necessitated her putting into the port of Maranham, and eventually the ship was condemned and sold by order of the Tribunal of Commerce at Maranham, and such portions of the cargo as were not rendered useless by sea-damage were also sold.

At the trial it was admitted that the sea damage to the ship and cargo which necessitated the putting into Maranham caused an average

loss of both ship and cargo, but not a total loss of either; and it was agreed that the amount should be referred.

The defendants admitted that the ship was seaworthy when she sailed from Monte Video, and that she sailed from Monte Video intending to proceed to England, and they further admitted the interest as averred.

It was agreed that the Court should draw all inferences, and have all such powers as a Judge at nisi prius as to amendment or otherwise.

The Court or either party was to have power to refer to the pleadings and the several depositions and exhibits thereto, and the demurrer on the record was to be argued along with the case.

The pleas in the action were delivered on the 19th July, 1861, and the plaintiffs applied at Chambers on the 20th March, 1863, and also at the trial, to add an equitable replication to the fourth plea, to the effect "that at the time of effecting the insurance it was stated to the defendant that the goods insured had been originally loaded at Patagonia and brought thence to Monte Video in the same vessel on board of which they were subsequently despatched from Monte Video, and that the insurance was to be on such goods; and that it was agreed between the plaintiffs and the *defendant that the policy was to apply to such [*420 goods and no others, and that the claim in the action is made in respect of the said goods. That part of the said goods were unloaded and again loaded on board the said ship at Monte Video, and that it was contrary to the intention of both plaintiffs and defendant that the policy should be held to apply only to goods originally laden on board the vessel at a port in the river Plate, and not to apply to goods originally laden at Patagonia, and brought thence to Monte Video." The plaintiff's application was refused both at Chambers and at the trial.

The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover under the policy in respect of both ship and cargo, or either, and which of them, or any part thereof.

If the Court should be of opinion in favour of the plaintiffs, the verdict was to stand for them for the amount of the average loss to be settled as already agreed:

If the Court should be of opinion that the plaintiffs were entitled to recover only in respect of the ship or only in respect of the cargo, then the verdict should be entered for the plaintiffs, in such manner as the Court thought proper, the average loss in either case to be settled as already agreed.

If the Court should be of opinion that the plaintiffs were not entitled to recover either in respect of the ship or of the cargo, then a nonsuit was to be entered.

The case was argued in the Court below, in Michaelmas Term, 1863, November 17.

Edward James (Milward and W. Potter with him), for the plaintiffs.—First. The proposition that a policy in the *present form [*421 will not cover goods put on board before the time specified for the commencement of the adventure does not hold universally. It is a strict rule, and one at which the Courts arrived with reluctance: *Rickman v. Carstairs*, 5 B. & Ad. 651 (E. C. L. R. vol. 27); *Robertson v. French*, 4 East 130. *Nonnen v. Kettlewell*, 16 Id. 176, is in point. There an insurance was effected from Landsrona to Wolgast, and although it appeared that the goods had been loaded on board the ship.

at Gottenburgh before she arrived at Landscrona, the plaintiff was held entitled to recover. That case is supported by *Bell v. Hobson*, 16 East 240, 3 Camp. 272, and *Gladstone v. Clay*, 1 M. & S. 418. Here was, in point of fact, a reloading at Monte Video, and an entirely new adventure within the terms of the policy commencing from that place. The objection can at most apply only to the insurance on the *goods*, not to the insurance on the *ship*.

Secondly. There was no concealment of material facts.

Brett (*Cohen* with him), *contra*, on the first point argued to the same effect as afterwards in the Court of Exchequer Chamber. [He cited *Spitta v. Woodman*, 2 Taunt. 416; *The William*, 5 Ch. Rob. 385; and *Murray v. The Columbian Insurance Company*, 11 Johns. 302.]

On the second point he cited 2 Duer on Insurance 391.

Edward James, in reply, cited on the second point, *Boyd v. Dubois*, 3 Camp. 133, and *Russell v. Thornton*, 4 H. & N. 788.

*422] COCKBURN, C. J.—There are two questions on which *the Court must give judgment. First. Whether the risk attached on the cargo as loaded at Monte Video, the cargo in fact having been loaded at Liones Island in Patagonia; it being contended that, according to the rule laid down in the cases cited, the terms of the policy have not been complied with. Secondly. Whether material facts were not brought to the knowledge of the underwriter at the time of the insurance.

As to the first, it is true there has not been an actual loading on board this ship at Monte Video, and if the authorities establish the conclusion that an actual loading must take place in the port mentioned in the policy, no doubt the defence of the underwriter would be sufficient. But I think *Nonnen v. Kettlewell*, 16 East 176, establishes sufficiently for the present purpose that there may be a constructive loading at a particular place so as to satisfy the language of such a policy as this. In that case, the cargo having been put on board at a port, the vessel came to that from which she was insured, in order to have the amount of duties ascertained, and the cargo was examined with that view. A portion of it was taken out for the purpose, and when the Custom House officers discharged their functions it was put back again; and this was held a sufficient loading of the *whole* cargo at the second port to satisfy the terms of the policy. According to the authority of that case, therefore, a constructive loading will suffice, and this brings us to the question, has there been a constructive loading here? We find that when this vessel came to Monte Video, having sustained some sea damage, a portion of the cargo was taken out, and afterwards replaced, and that renders the case very similar to *Nonnen v. Kettlewell*. But I prefer basing *my decision on the broader ground, *423] namely, that here was a change in the ownership and destination of the vessel. When the cargo was loaded on board it was agreed that it might come to any port in England; on the transfer of the cargo to other hands the new voyage of the ship was to be to any port in the United Kingdom. That is an entire change of ownership and a partial change of destination, which made this a new adventure and a new voyage. This cargo must therefore be considered as constructively shipped and loaded at Monte Video.

I do not wish to pronounce any opinion relative to the principle on

which *Nonnen v. Kettlewell* was decided. It is clear, however, that Lord Ellenborough, both in that case and in *Bell v. Hobson*, 16 East 240, 3 Camp. 272, thought that the old rule in force before those cases had gone quite far enough; and that where it could be seen there was a substitution of a new state of things, what virtually amounted to a loading of the cargo at the place specified would suffice. If either the view taken by the Court in *Nonnen v. Kettlewell*, or its application to this case, is erroneous, the Court of Exchequer Chamber can review our decision. That case has been followed by various others; but it has never come under the review of a Court of error, and I think it is desirable that it should be confirmed if it is to be confirmed, and reversed if it is to be reversed. For the purpose of to-day it is enough to say the present case comes within the principle there laid down.

On the second point, I do not think that we are called on to pronounce an opinion on the matter decided in *Boyd v. Dubois*, 3 Campb. 133. It seems to me a strong *proposition to say that where [*424 goods are insured, and when shipped are in such a condition as to contain in themselves the germ of their own probable destruction, that is a matter which need not be brought to the knowledge of the underwriters. If it were necessary for the decision of this case to carry that dogma to its full extent, I should like time to consider. But it is not necessary, for the facts here enable us to decide the case without it. It does not appear that the cargo generally had been damaged; a small portion to which it was shown some damage was done by sea water had been landed, and perhaps dried before it was put on board again. But suppose there had been partial damage to the cargo, it is doubtful if that fact was brought to the notice of any of the parties. It appears that the vessel and cargo belonged to Da Costa, Brothers, of Monte Video, who would naturally take care of them, and there is nothing here to warrant the inference that they knew of the previous wetting of even this small portion of the cargo. Practically the insurance here was for the benefit of Jacobs & Company, by whom money had been advanced on this cargo, and who would lose if it received any damage, and there is nothing to show that they either had any knowledge of this. The case therefore fails as to there having been anything material to communicate, but still more so, as to whether if there were it was brought to the knowledge of Da Costa & Company, and still more of Jacobs & Company.

WIGHTMAN and MELLOR, JJ., concurring,

Judgment for the plaintiffs, both on the demurrer and on the issues of fact.

*The defendant having brought error on this judgment, the case was now heard before ERLE, C. J., WILLES and KEATINGE, [*425 JJ., and BRAMWELL, CHANNELL and PIGOTT, BB.

Brett (*T. Jones*, Northern Circuit, and *Cohen* with him), for the defendant.—According to the express terms of this policy the adventure was to begin from the loading of the ship “from port or ports in the river Plate.” It appears, however, that the ship, under another name, was originally loaded in Patagonia, that she arrived at Monte Video in the river Plate in a damaged condition, when a portion of her cargo was removed to enable the owners to repair the damage, and was then

replaced. There is a strong current of authority that, whatever the knowledge or intention of the parties, the language of such a policy as the present does not attach unless the goods are loaded in the ordinary way at the place specified in the policy: 1 Arnould on Insurance, pp. 471-2, 2d ed.; Robertson v. French, 4 East 130; Horneyer v. Lushington, 15 Id. 46; De Symonds v. Shedden, 2 B. & P. 153; Spitta v. Woodman, 2 Taunt. 416; Langhorn v. Hardy, 4 Id. 628; Redman v. Lowdon, 5 Id. 462 (E. C. L. R. vol. 1); Mellish v. Allnutt, 2 M. & S. 106; Rickman v. Carstairs, 5 B. & Ad. 651 (E. C. L. R. vol. 27). [ERLE, C. J., referred to Tobin v. Harford, 13 C. B. N. S. 791 (E. C. L. R. vol. 106)]. A similar construction has been put on this clause *426] in the United States of America. In 1 Phillips on Insurance, p. 511 *et seq.*, § 939, 3d ed., "Whether specifying the risk to begin 'on the loading of goods' is mere description, or a warranty that the goods shall be loaded at the port named?—This description restricts the commencement of the risk, when it has any effect, and the jurisprudence presents divers instances of the failure of insurances under this description, which would have taken effect under the more general one 'at and from.'" He then cites several cases, and among them Hodgson v. Richardson, 1 W. Bl. 463; and the American cases of Richards v. The Marine Insurance Company, 3 Johns. 307, and Murray v. The Columbian Insurance Company, 11 Id. 302.

In the Court below *Nonnen v. Kettlewell*, 16 East 176, was relied on by the other side. That, however, is rather a decision on *facts* than on *law*. Besides, the judgment proceeds partly on the ground that the policy was free from average, a circumstance which is of no importance. Moreover, the report cannot be trusted, for it professes to set out in a note, p. 188 note (a), the previous case of *Spitta v. Woodman*, 2 Taunt. 416, and sets it out incorrectly. It is true that the Court below decided in accordance with that case, but they added that it might be reconsidered in a Court of error, and that they preferred determining the present case on principle, namely, that there had been at Monte Video a change both of owners and destination, so as to constitute an entirely new adventure. But nothing was done here which, according to mercantile usage, amounted to a reloading of the entire cargo. Mere excess in the rate of premium is immaterial: *Halhead v. Young*, 6 E. & B. 312 (E. C. L. R. vol. 88). It is difficult to attach any meaning to *the *427] term "constructive" loading. In *Harrison v. Ellis*, 7 E. & B. 465 (E. C. L. R. vol. 90), Erle, J., says, p. 481, "It would be contrary to sound principles of construction to alter the meaning of plain distinct words defining the beginning of the adventure because of words the meaning of which I cannot expressly define." In *The William*, 5 Ch. Rob. 385, Sir W. Grant says, p. 395, "The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done."

Milward (*W. Potter* with him), for the plaintiffs, was not heard.

ERLE, C. J.—This judgment must be affirmed. Here is a policy of insurance on the ship *Dos Hermanos* and her cargo of guano, at and from port or ports in the river Plate to the United Kingdom. And the question is if the policy ever attached, especially with respect to the

guano, because it says, "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship *at as above*," that is, from the river Plate. The cargo had been originally loaded on board at Patagonia, and was brought into the river Plate in the ship in a distressed state, and there part of the cargo, that is to say, enough to enable the shipper to repair the ship, was taken out, and on her being repaired was put on board again. I decide this case on the authority of *Nonnen v. Kettlewell*, 16 East 176, that the stipulation for loading **at the port of departure* is satisfied here, as it was there, [*428 notwithstanding there was a partial reloading at that port. And that case being, as I consider, in accordance with the widest and most important principles, if there were a conflict of authority on the subject I should abide by that which is founded on reason. But that case is not an exceptional one, as put by Mr. *Brett*. The contract of insurance, though a mercantile instrument, is to be construed according to the same rules as all other written contracts, namely, the intention of the parties, which is to be gathered from the words of the instrument interpreted together with the surrounding circumstances. If the words of the instrument are clear in themselves the instrument must be construed accordingly, but if they are susceptible of more meanings than one, then the Judge must inform himself by the aid of the jury and the surrounding circumstances which bear on the contract.

In the first case relied on by Mr. *Brett*, *Robertson v. French*, 4 East 130, Lord Ellenborough in delivering the judgment of the Court says, p. 135, "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases: it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments, applies equally to this instrument of a policy of insurance, viz. that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular [*429 **sense*, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." In that case there was no doubt whatever as to the meaning of the subject of insurance. Goods were insured beginning the adventure from the loading, &c., "at all, any, or every port and place where and whatsoever on the coast of Brazil." There is a full description that the intended adventure was with respect to goods put on board at Brazil, so that the holding that that policy extended to any port not of Brazil would defeat the intention of the parties. In another of Mr. *Brett's* cases, *Spitta v. Woodman*, 2 Taunt. 416, the insurance was on a ship "at and from Gottenburgh" to her first port of discharge in the Baltic, on specific goods, "beginning the adventure upon the said goods from the loading thereof on board the said ship," not saying where. The ship was loaded in London and sailed thence, bound for Gottenburgh, or some port in the Baltic. On her arrival at Gottenburgh, the port

replaced. There is a strong current of authority knowledge or intention of the parties, the language the present does not attach unless the goods are way at the place specified in the policy: 1 Ar 471-2, 2d ed.; Robertson v. French, 4 East 119; 15 Id. 46; De Symonds v. Shedden 10 Taunt. 418; Langhorn v. P 10 Taunt. 418; Lowdon, 5 Id. 462 (E. C. L. R. vol. 1) 106; Rickman v. Carstairs, 5 B. & [ERLE, C. J., referred to Tobin v. H L. R. vol. 106)]. A similar const

*426] in the United States of A p. 511 et seq., § 939, 3d

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attached the smallest importance to the place of loading, the defendant

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those words were held essential. I have taken that result of the cases

from Phillips; and in Richards v. The Marine Insurance Company, 8

Adams 307, cited from him by Mr. Brett, the words may have been of

importance or not. But the Judge before whom the cause was tried

adhered to the construction put by him at the trial, that they were;

and when the plaintiff applied for a new trial on the ground that the

assurers subscribed the policy with full knowledge that the cargo which

arrived at Nevitas in Cuba would not be permitted to be landed; instead

of saying that the words were incapable of being affected by surround-

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meaning, because the plaintiff ought to have been prepared with that

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at case inconsistent with the principles we have already laid down ;

and that enables me to rely with the more confidence on *Nonnen v.*
Kettlewell, 16 East 176.

KRATING, J., and CHANNELL, B., concurred.

Judgment affirmed.

(a) These learned Judges had left the Court during the argument.

*CARR and Another v. The ROYAL EXCHANGE Assurance Corporation. May 11.

[*433

Marine Insurance.—Policy.—Special memorandum.

The plaintiffs effected with the defendants a policy of assurance on a ship and her cargo of guano, which contained the following clause: "free from all average or claim arising from jettison or leakage unless consequent upon stranding, sinking, or fire." During the voyage the ship, by tempestuous weather, became leaky, and was compelled to put into a port, and was there found unfit to proceed on her voyage, which was abandoned, and the ship and goods sold. Held, by the Queen's Bench, and judgment affirmed in the Exchequer Chamber, that the plaintiffs were entitled to recover as for an average loss.

THIS was an action upon a policy of assurance, dated 5th December, 1857, effected by the plaintiffs with the defendants' Company, for 2500*l.* on the ship *Dos Hermanos* and her cargo of guano, "at and from Monte Video and any ports in the river Plate to any ports in the United Kingdom, with leave to call and wait at any ports in the Irish or English Channel for orders,

Being on { Ship 1500*l.* } 5000*l.*,
 { Guano 3500*l.* }

Free from all average or claim arising from jettison or leakage unless consequent upon stranding, sinking or fire. The value of *l.* to be mutually admitted in adjusting and deciding all claims for loss or particular average."

of Pillau was assigned as the port of discharge, for which place she sailed, and having been captured it was held that the underwriters were not liable. But it seems to me that that construction defeated the intention of the parties.

This subject was much considered by this Court in *Behn v. Burness*, *430] 3 B. & S. 751, reversing the judgment of the *Queen's Bench, 1 B. & S. 877 (E. C. L. R. vol. 113), where it was laid down that it is a question of construction whether a descriptive statement in a policy of insurance is a mere representation or a substantive part of the contract. Here the words "at and from port or ports in the river Plate to the United Kingdom," "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at as above," are to be looked at with the surrounding circumstances of the case. From those circumstances it appears that at the time the contract was made the parties had full notice that perhaps no part of the cargo was loaded in the river Plate, that it was a Patagonian cargo, and that their intention was to effect an insurance on the *Dos Hermanos* and her cargo, which had then gone over a considerable portion of her voyage. The provision in the policy as to the adventure beginning from the loading in the river Plate I should say was a mere description and not a condition precedent. I take Phillips on Insurance to be a masterly book, and he thus heads his article 939, vol. 1, p. 511, 3d ed., in which this matter is discussed, "Whether specifying the risk to begin 'on the loading of goods' is mere description, or a warranty that the goods shall be loaded at the port named?" He goes through many cases, some of them confirming the view of Mr. Brett, but at p. 516 he says, "These discrepant decisions evidently do not coincide in support of any general proposition. That to which they seem to be the nearest approximation, and which may be adopted without a departure from any general principle, is, that this specification of the terminus à quo, unless it appears by the policy to be intended as a warranty of the loading at *431] the designated place, is to be taken as mere recital, *description, or intention or expectation, being at most an implied representation of the loading, and is to be construed accordingly." It cannot therefore be said that the American lawyers have been entirely consistent in what I think an unwarrantable extension of *Robertson v. French*, 4 East 130.

Looking at all the cases in which it appears underwriters never attached the smallest importance to the place of loading, the defendant here should not be allowed to defeat his liability because in some cases those words were held essential. I have taken that result of the cases from Phillips; and in *Richards v. The Marine Insurance Company*, 3 Johns. 307, cited from him by Mr. Brett, the words may have been of importance or not. But the Judge before whom the cause was tried adhered to the construction put by him at the trial, that they were; and when the plaintiff applied for a new trial on the ground that the assurers subscribed the policy with full knowledge that the cargo which arrived at Nevitas in Cuba would not be permitted to be landed; instead of saying that the words were incapable of being affected by surrounding circumstances, the Court refused to hear an affidavit to show their meaning, because the plaintiff ought to have been prepared with that evidence at the trial. Without at all intending to run counter to a

series of decisions, I dispose of this case because I think *Nonnen v. Kettlewell*, 16 East 176, decisive in favour of the plaintiffs, whether the general question is subject to the meaning which Mr. Phillips puts upon it, or whether the stricter construction of Mr. *Brett* ought to prevail.

*I think I may say that my brothers Willes and Pigott^(a) [*432 concur with me in this decision.

BRAMWELL, B.—I wish to add one word. I have no desire to overrule cases already decided, but I think the construction of this clause is as stated by Lord Chief Justice Erle. And in this I think that we do not dissent from or overrule *Robertson v. French*, 4 East 180. It is not necessary to go into an elaborate argument to show why I think so, but, from the very words of the policy there, if loading the goods at a particular place were meant to be a condition precedent, that would have been more distinctly stated. As well as I understand that case, for it is not very clearly reported, a vessel had taken a cargo on board at the Cape of Good Hope, with the intention of trading to Brazil and bringing back a return cargo from thence. Insurance was made on the return cargo, and the ship was insured in like manner, and according to my judgment what the Court decided was, that neither ship nor cargo was insured till the beginning of the return voyage. There is nothing in that case inconsistent with the principles we have already laid down; and that enables me to rely with the more confidence on *Nonnen v. Kettlewell*, 16 East 176.

KEATING, J., and CHANNELL, B., concurred.

Judgment affirmed.

(a) These learned Judges had left the Court during the argument.

*CARR and Another v. The ROYAL EXCHANGE [*433
Assurance Corporation. May 11.

Marine Insurance.—Policy.—Special memorandum.

The plaintiffs effected with the defendants a policy of assurance on a ship and her cargo of guano, which contained the following clause: "free from all average or claim arising from jettison or leakage unless consequent upon stranding, sinking, or fire." During the voyage the ship, by tempestuous weather, became leaky, and was compelled to put into a port, and was there found unfit to proceed on her voyage, which was abandoned, and the ship and goods sold. Held, by the Queen's Bench, and judgment affirmed in the Exchequer Chamber, that the plaintiffs were entitled to recover as for an average loss.

THIS was an action upon a policy of assurance, dated 5th December, 1857, effected by the plaintiffs with the defendants' Company, for 2500*l.* on the ship *Dos Hermanos* and her cargo of guano, "at and from Monte Video and any ports in the river Plate to any ports in the United Kingdom, with leave to call and wait at any ports in the Irish or English Channel for orders,

Being on { Ship 1500*l.* } 5000*l.*,
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Free from all average or claim arising from jettison or leakage unless consequent upon stranding, sinking or fire. The value of *l.* to be mutually admitted in adjusting and deciding all claims for loss or particular average."

The first count of the declaration, after averring the making of the policy, &c., stated that the ship with the goods on board departed from Monte Video on the voyage, and during the continuance of the risk, by tempestuous weather, became leaky, and was damaged, and was compelled to proceed to a port of safety, to wit, Maranham; that she was *434] there found unfit to proceed *on her voyage, and that it became necessary to abandon the voyage, and to sell the ship and goods, and they were accordingly sold, and the vessel and goods were wholly lost. Averment of performance of all conditions precedent. Breach, non-payment of the amount insured. There were also the common money counts.

The defendants pleaded to the first count, Not guilty by statute under their special Act, upon which issue was joined. As to the residue they brought money into Court, which the plaintiffs accepted in satisfaction.

The cause came on to be tried, before Martin, B., at the Spring Assizes, 1863, at Liverpool, when by consent a verdict was found for the plaintiffs for the amount claimed, leave being reserved to the defendants to move on any points.

In Easter Term following, a rule nisi was obtained by the defendants for entering a nonsuit or reducing the damages on the ground, among others, that the policy was free from average.

The parties afterwards stated the facts in a special case, which is set out in the preceding case.(a)

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover under the policy, and in respect of both ship and cargo, or either, and which of them, or any part thereof.

If the Court should be of opinion in favour of the plaintiffs, the verdict was to stand for the amount of the average loss to be settled as agreed. If the plaintiffs were entitled to recover only in respect of the ship, or only in respect of the cargo, the verdict was to be entered for the plaintiffs as the Court should think proper. The average loss in *435] either case to be settled as agreed. If the *plaintiffs were not entitled to recover either in respect of the ship or the cargo, a nonsuit was to be entered.

The case was argued in the Court of Queen's Bench in Michaelmas Term, 1863, on the 20th November.

Edward James (W. Potter with him), for the plaintiffs.—The only question is, whether the plaintiffs can recover in respect of a partial loss: this depends upon the written words introduced into the printed form of the policy, “free from all average or claim arising from jettison or leakage unless consequent upon stranding, sinking or fire.” The cargo, consisting of guano, which is not a memorandum article, was liable to sustain damage by sea water; and the object of the above words was to provide against the loss of the guano which might be pumped up with the leakage water or thrown overboard on account of its being spoiled. The terms “jettison” and “leakage” are not here used in their ordinary sense. The latter, in its ordinary sense, means injury from the leaking of the vessel, though not caused by tempestuous weather; and in that sense cannot be applicable to a cargo of guano. The former means not simply the throwing overboard of a portion of the guano but of a portion of the guano, corrupted by being mixed with

water: omne majus continet in se minus. "Average" and "claim arising from jettison or leakage" mean the same thing.

Brett (*Cohen* with him), for the defendants.—The whole scope of the policy shows that the only object of the clause as between the underwriters and the assured was to meet the case of the guano being damaged by bilge-water from the ordinary leakage of the ship. Questions have arisen whether such damage did or did not *come within [*436 "average loss," and the present clause was inserted to prevent the litigation which often arose from that state of things. The intention was that the underwriters should not be liable except for a total loss, and that they should be able to protect themselves from a disputed claim in respect of this description of cargo. This construction gives effect to all the words in the clause by making them apply to different things; whereas the reading suggested on the other side makes "claim" and "average" synonymous. [WIGHTMAN, J.—Could the plaintiffs have recovered if those words had not been inserted?] If the damage arose from admitted sea peril they could; but this clause was introduced to prevent litigation as to whether the loss arose from such or not, *e. g.*, a dispute might arise whether rough weather amounted to a peril of the sea. [BLACKBURN, J.—That is a controversy of fact.] There can be no jettison consequent upon sinking. [BLACKBURN, J.—Suppose the ship sank in not very deep water and was raised, the loss would be partial. COCKBURN, C. J.—How is leakage consequent upon fire? Leakage has been applied to an escape of part of a dry cargo which is capable of becoming liquid by the access of water, and it may be applied to guano becoming moist and in a leaky condition. Jettison clearly applies to the cargo, therefore probably leakage does.]

Edward James, in reply.—If the words in this clause are used in their proper sense it will not be possible to give effect to them all. "Leakage" cannot mean damage to the ship; for there will be bilge-water in the normal state of the ship, and water may come into her without leakage from shipping a sea; in which case pumping would be necessary and some essential particles of the *guano would be lost, though not from throwing any overboard. [BLACKBURN, [*437 J., referred to *Hills v. The London Assurance Corporation*, 5 M. & W. 569.]

COCKBURN, J.—It is very doubtful what the owners of the goods and the underwriters meant by the language used in this policy. Their object was, as Mr. *Brett* suggests, to prevent disputes arising as to this commodity, which is brought over in large quantities, and is subject to disintegration by the access of sea water; but their endeavour to obviate the necessity of litigation has led to it. If punctuation had been employed, two commas would have made the sense clear, but in the absence of that assistance I am in doubt how the clause ought to be read. There is, however, great force in the argument that the words "or claim arising from jettison or leakage," &c., are superfluous, if not taken as explaining the preceding word "average." The claim arising from jettison or leakage is "average," and it was unnecessary to put in those words if the construction contended for by the defendants is the true one. I am inclined therefore to think, that the true reading of the policy, putting a comma after the word "claim," is this, "free from all average or claim, arising from jettison or leakage, unless consequent

upon stranding, sinking, or fire," so as to make the whole description apply to the words "average or claim." The words "or claim" have been introduced to enlarge the meaning of the word "average" in case of any claim arising which might be thought not to fall within it.

WIGHTMAN, J.—It appears to me that the word "claim" was introduced ex abundanti cautela to include *everything which might possibly arise from jettison or leakage—there might be a claim as well as average for a loss arising from either. The words "arising from jettison or leakage" must be applicable to the whole of the earlier part of the sentence, so that, whether the loss was or was not strictly an average loss, in either case if it arose from jettison or leakage it is to be excluded.

BLACKBURN, J.—Possibly the words "or claim" were introduced to show that the word "average" was meant to be used in an extended sense, not merely for particular average, but for general average. But whatever may have been the object of introducing them, there could be no claim capable of being enforced against the underwriters which would not come within the term "average:" and therefore the words "or claim arising from jettison or leakage" are redundant, unless they were introduced to show that the word "average" was restricted to average arising from jettison or leakage. The plaintiffs are therefore entitled to recover unless the loss was an average or claim arising from jettison or leakage, and not consequent upon stranding, sinking or fire: and from the facts it appears that the loss did not so arise.

Judgment for the plaintiffs.

Error was brought on this judgment, but the defendants deeming the case concluded by the preceding one of *Carr v. Montefiore*, ante, p. 408, declined to argue it, and the judgment was accordingly affirmed.

Edward James (Milward and W. Potter with him), for the plaintiffs.

T. Jones, Northern Circuit, and *Watkin Williams* with him), for defendants.

Judgment affirmed.

END OF EASTER VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Trinity Term,

XXVII. VICTORIA. 1864.

The Judges who usually sat in Banc in this Term were:—

COCKBURN, C. J.

BLACKBURN, J.

CROMPTON, J.

SHEE, J.

The following cases, decided in this Term, have been already reported.

GANDY v. JUBBER	ante, p. 92
HODGMAN v. THE WEST MIDLAND RAILWAY COMPANY	173
THACKERAY v. WOOD	325
HARRIS v. SWINBURN	370
REG. v. THE INHABITANTS OF GREAT SALKELD	377
ROBERTS v. ROBERTS	384
REG. v. THE OVERSEERS OF SOUTH WEALD	391

*COE v. WISE, Clerk to the MIDDLE LEVEL Drain-
age Commissioners. May 24. [*440

*Public body.—Negligence.—Agent.—Damage.—Middle Level Drainage
Commissioners.*

The Middle Level Drainage Commissioners were empowered and directed by statute to make a cut, and make and maintain at or near its opening a sluice to exclude the tidal waters. They were trustees for a public purpose, and acting without reward. The sluice was properly made, but owing to the absence of due care and skill in the persons employed by them to maintain it, the sluice burst, whereby the tidal waters came in and flooded the neighbouring lands. There was no proof that the Commissioners had negligently or improperly employed unskilful or incompetent agents. Held, that the Commissioners were not liable to an action at the suit of the owners of the neighbouring lands: per Cockburn, C. J., and Mellor, J.; dissentiente Blackburn, J.

THIS was an action against the defendant, as clerk to the Drainage Commissioners for carrying into execution stat. 7 & 8 Vict. c. cvi., for
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improving the drainage and navigation of The Middle Level of the Fens. The declaration, dated the 24th October, 1862, alleged that the plaintiff was possessed of lands in the parishes of Tilney All Saints, Tilney cum Islington and Tilney St. Laurence, in the county of Norfolk, within a certain district called Marshland Fen, and that by the said Act it was enacted that the Drainage Commissioners should make and maintain a cut for conveying the water from the Middle Level into the river Ouse, and which cut should commence at the sixteen feet river, about half a mile above the lower end of the said river, and should terminate at the river Ouse, southward of a sluice called the Marshland New Sluice, and the bottom of the cut at the lower end thereof should not be less than fifty feet in width, nor less than three feet below the datum line of the several plans and sections of the cut deposited with the clerks of the peace of the counties of Norfolk, Cambridge, Huntingdon and *441] the Isle of Ely; and *the sides of the cut should be made with gradient and proper slopes from the bottom thereof to the surface of the land, and the Drainage Commissioners should also, where necessary, make and maintain in a substantial manner, a bank on each side of the cut, with front and back forelands thereto; and each of the banks should be constructed with a good and sufficient puddle clay wall in or near the centre thereof, of a proper depth, width, height and dimensions, and so as effectually to defend the lands lying on each side of the drain from the passage of the water through the bank at all times, and the puddle wall and banks should be so formed and maintained as effectually to prevent the water of the cut from passing over or making through the same into any of the adjoining lands; and that by the said Act it was further enacted that the Drainage Commissioners should make and maintain a good and substantial sluice of brick and stone at or near the entrance of the cut into the river Ouse, with two or three openings, the waterways of which should not altogether be less than fifty feet, and with doors to each of the openings of sufficient height to exclude the tidal waters, and the sill sluice should be placed not less than six feet below the aforesaid datum line in the Act mentioned; and that after the passing of the said Act the Drainage Commissioners did make a cut for the purpose aforesaid, commencing and terminating as by the Act is directed (to wit) in and through Marshland Fen aforesaid, and did also make a sluice of brick and stone at or near the entrance of the said cut into the river Ouse: Yet the Drainage Commissioners so carelessly, negligently, unskilfully, and wrongfully conducted themselves in and about making and maintaining the cut, banks and walls thereof, and in *442] and about making and maintaining *the said sluice good and substantial, that by means of such their careless, negligent, unskilful, wrongful and improper conduct the tidal waters burst, ran and broke through the sluice and into the cut, and broke down and passed over and through the banks of the cut into Marshland Fen and overflowed and submerged the same and the lands of the plaintiff; and by reason of the premises the plaintiff, who then was seised in his demesne as of fee in certain part of the lands, and possessed for an unexpired term of years of certain other part of the lands, not only was and for a long space of time would be expelled from and deprived of the use of his lands, but certain crops then on the lands were destroyed, and the plaintiff lost the gains which otherwise he would have made of the same, and

also by reason of the premises the lands of the plaintiff became saturated with the waters of the sea, and made unfit for bearing crops, and the fertility of the same has been destroyed: claim, 4000*l*.

Pleas. First. That the Drainage Commissioners were not guilty.

Second. That the plaintiff was not seised or possessed as alleged.

Issue on both pleas.

On the trial, before Erle, C. J., at the Norfolk Spring Assizes of 1863, the following facts were proved.

The defendants, the Middle Level Drainage Commissioners, were constituted by stats. 50 G. 3, c. 125 (local and personal), and 7 & 8 Vict. c. cvi.

The cut and sluice mentioned in the declaration, and directed to be made by the 137th and 138th sections respectively of stat. 7 & 8 Vict. c. cvi., were made from the designs and under the superintendence of the late Mr. Walker, an eminent civil engineer, and completed in [*443 1848; and from that time until the present the cut had been used as the channel for conveying the waters from the Middle Level into the river Ouse, and thence by the Ouse to the sea.

The Commissioners contracted for the making of a puddle wall on the banks of the cut in the very terms of stat. 7 & 8 Vict. c. cvi.

The cut passes right through Marshland to the river Ouse, which it enters at the above New Sluice, but Marshland is not drained by the cut, and it has, and for a long time has had, a system of drainage of its own (except as hereinafter stated), wholly separate and distinct from that of the Middle Level, but it drains into the Ouse. In pursuance of stat. 7 & 8 Vict. c. cvi., s. 170, certain lands in Wiggenhall, consisting of about 300 acres, within Marshland, have been from the opening of the cut, and still are, drained by the same.

Marshland contains about 40,000 acres, and extends from the Middle Level to the river Ouse.

The plaintiff is an owner and occupier of lands in Marshland, adjoining to the cut.

From the completion of the works in 1848 till after the failure of the sluice after mentioned, William Bond was the sluicekeeper at a salary of 50*l*. a year, with a house and garden, and the only person who lived at the sluice. Previously to having the charge of this sluice he had been sluicekeeper at the Tongs Sluice, the outlet of the cut through Marshland, by which the Middle Level drained previous to the making of the cut in the declaration mentioned. He was brought up with his father who was a sluicekeeper, and his whole life had been spent in such work. He had to enter in a book the height of high and low water at every tide as denoted by the gauges fixed at the sluice, and it [*444 was his duty, if he observed anything unusual, to report it to the superintendent or resident engineer of the Commissioners, in order that he might inspect the matter and do what was necessary to keep everything in proper order. From 1858 until after the fall of the sluice Robert Lunn was the superintendent or resident engineer of the works of the Commissioners, and lived at March, which is about the centre of the Middle Level district, and is about 16 miles distant from the sluice. He had not gone through a regular scientific education, but before his appointment had had considerable experience in engineering works, and had been concerned in the construction of the cut, banks and bridges as

agent to Mr. Thornbury, the contractor for making the same, and had also superintended those branches of the works for Mr. Thornbury from their commencement in 1845 till their completion in 1848. He was sole superintendent of the works of the Middle Level, which are very extensive. He had not the custody of the drawings of the sluice, which were retained by the principal engineer, Mr. Walker, and which Lunn in fact saw for the first time at his own request at Mr. Walker's office in London on the 2d May, 1862, he having gone there to consult Mr. Walker as to the dangerous state in which the sluice then was. Bond and Lunn were examined as witnesses for the Commissioners. Mr. Walker and his partner, Mr. Cooper, continued to be the principal engineers of the defendants until two or three weeks before the 2d May, 1862, when, in consequence of the then recent sudden death of Mr. Cooper and his own advanced years, Mr. Walker expressed a wish to retire, and before the 2d May Mr. Hawkshaw had been applied to, to succeed Mr. Walker as principal engineer.

In March, 1862, symptoms appeared near the sluice which although at the time they did not appear to Lunn, whose attention was called thereto by Bond, to be of any material importance, yet were subsequently ascertained to indicate danger to the sluice. Lunn did what he thought was required, and on the 2d May conferred with Mr. Walker thereon, and on the 4th May the sluice gave way. The tidal waters from the river Ouse thereupon flowed up the cut, and on the 12th May the waters in the cut overflowed and made a breach in the west bank of the cut, whereby the lands of plaintiff were overflowed and damaged. On the 2d May Lunn consulted Mr. Walker as above stated, but no communication was made to the Commissioners of any damage or apprehension of danger to the sluice, nor to their clerk, until six o'clock of the evening of the 4th May, when a letter was sent by Lunn to the clerk about three hours before the sluice gave way, and it was then too late to prevent the blowing up of the sluice. On the following morning the Commissioners consulted Mr. Walker, Mr. Hawkshaw, and other eminent engineers, and about the middle of the same day gave authority to Mr. Hawkshaw to take such steps, and execute such works as he should deem necessary to prevent the tide from flowing into Marshland and prevent injury to the country generally, regardless of expense, and Mr. Hawkshaw accordingly took steps for that purpose.

The waters from the Middle Level passing along the cut had not, from the making of the cut until the 12th May, gone over the banks of the cut.

*446] The funds of the Commissioners are derived under *stats. 7 & 8 Vict. c. cvi. ss. 182, 183, 188, 204, 205, 220, 231, 235, 237, and 11 & 12 Vict. c. civ., ss. 27, 28, 29, and 43.

The borrowing powers of the Commissioners have been fully exercised, and the whole of the mortgages remain still undischarged, and at the time of the trial the Commissioners had no surplus funds.

It was agreed that a pamphlet containing the summing up of Erle, C. J., a certain map of the lands inundated, a plan of the Bedford Level, and the statutes 22 G. 2, c. 16; 7 & 8 Vict. c. cvi., and the Acts therein cited or referred to; 11 & 12 Vict. c. civ., and 25 & 26 Vict. c. clxxxviii., might be referred to.

The Lord Chief Justice reserving leave to the defendant, if necessary,

to move the Court to enter the verdict for him, left the following four questions to the jury: Was damage caused to the plaintiff by the absence of due care and skill on the part of the Commissioners; first, in respect of the making of the sluice; secondly, in respect of the maintaining of the sluice; thirdly, in respect of providing remedies against mischief after the sluice was destroyed; and, fourthly, was damage caused to the plaintiff by reason that no puddle clay wall was made along each of the banks of the cut? The jury answered the first question in the negative in favour of the defendant, and the other three questions in the affirmative in favour of the plaintiff. The verdict was accordingly entered for the plaintiff.

In Easter Term, 1863, the defendant, in pursuance of this leave, obtained a rule to enter a verdict for himself, on the ground that the action was not maintainable, because, the Drainage Commissioners being a public body and bound to discharge public duties without reward, and the Acts of Parliament providing no funds to meet such *a demand as was made in this action, they were not responsible for [*447 the negligence of engineers, contractors, officers, or servants whom they might employ.

The statutes bearing on this case were, the 22 G. 2, c. 16, 50 G. 3, c. 125 (local and personal), ss. 18, 30, 38, 7 & 8 Vict. c. cvi. ss. 19, 20, 21, 22, 137, 138, 182, 183, 188, 204, 205, 217, 220, 231, 235, 237, 239, and the statutes therein recited or referred to, 11 & 12 Vict. c. civ., 25 & 26 Vict. c. clxxxviii.

The case was argued in Michaelmas Term, 1863, but, in consequence of the decease of Wightman, J., before judgment was given, it was re-argued in Hilary Term, 1864, January 21st, 25th and 28th, before COCKBURN, C. J., BLACKBURN and MELLOR, JJ.

Keane, *Douglas Brown* and *Phear* showed cause, and Sir *Fitzroy Kelly*, *O'Malley*, *Metcalf* and *R. M. Newton* were heard in support of the rule.

The following authorities were cited in the course of the argument.

The Mayor of Lynn v. Turner, Cowp. 86; Whitfield v. Lord Le Despencer, Id. 754; The British Cast Plate Company v. Meredith, 4 T. R. 794; Sutton v. Clark, 6 Taunt. 29; Harris v. Baker, 4 M. & S. 27; Boulton v. Crowther, 2 B. & C. 703 (E. C. L. R. vol. 9); Rex v. The Inhabitants of Liverpool, 7 Id. 61 (E. C. L. B. vol. 14); Rex v. The Trustees of The Weaver Navigation, Id. 70, note (c); Rex v. Antrobus, 2 A. & E. 788 (E. C. L. R. vol. 29); The Mayor of Lyme Regis v. Henley, 3 B. & Ad. 77; The Governor of the Bristol Poor v. Wait, 5 A. & E. 1 (E. C. L. R. vol. 28); Reg. v. The Mayor of Liverpool, 9 Id. 435 (E. C. L. R. vol. 36); Reg. v. The Guardians of the Wallingford Union, 10 Id. 259; Parnaby v. The *Lancaster Canal Company, 11 Id. 223 (E. C. L. R. vol. 39); Reg. v. The [*448 Inhabitants of Exminster, 12 Id. 2 (E. C. L. R. vol. 40); Reg. v. Badcock, 6 Q. B. 787 (E. C. L. R. vol. 53); Allen v. Hayward, 7 Id. 960 (E. C. L. R. vol. 53); Reg. v. The Norfolk Commissioners of Sewers, 15 Id. 549 (E. C. L. R. vol. 69); Reg. v. The Harrogate Commissioners, Id. 1012; Birkenhead Docks Trustees v. The Birkenhead Overseers, 2 E. & B. 148 (E. C. L. R. vol. 75); Ward v. Lee, 7 Id. 426 (E. C. L. R. vol. 90); The Southampton and Itchin Bridge Company v. The Local Board of Health of Southampton, 8 Id. 801 (E. C. L. R. vol.

92); *Brine v. The Great Western Railway Company*, 2 B. & S. 402 (E. C. L. R. vol. 106); *Hartnall v. The Ryde Commissioners*, 4 Id. 361 (E. C. L. R. vol. 116); *Humphreys v. Mears*, 1 M. & R. 187; *Hall v. Smith*, 2 Bing. 156 (E. C. L. R. vol. 69); *Alston v. Scales*, 9 Id. 3 (E. C. L. R. vol. 23); *Pallister v. The Mayor of Gravesend*, 9 C. B. 774 (E. C. L. R. vol. 67); *Kendall v. King*, 17 Id. 483 (E. C. L. R. vol. 84); *Pickard v. Smith*, 10 C. B. N. S. 470 (E. C. L. R. vol. 100); *Whitehouse v. Fellowes*, Id. 765; *Clothier v. Webster*, 12 Id. 790 (E. C. L. R. vol. 104); *Holliday v. St. Leonard's, Shoreditch*, 11 Id. 192 (E. C. L. R. vol. 103); *Metcalf v. Hetherington*, 11 Exch. 257, in error, 5 H. & N. 719; *Scott v. The Mayor of Manchester*, 1 H. & N. 59, in error, 2 Id. 204; *Gibbs v. The Trustees of the Liverpool Docks*, 3 H. & N. 164; *Manley v. The St. Helen's Canal and Railway Company*, 2 Id. 840; *Ruck v. Williams*, 3 Id. 308; *Hole v. The Sittingbourne Railway Company*, 6 Id. 488; *The Mersey Docks Board v. Penhallow*, 7 Id. 329; *Young v. Davis*, 7 Id. 760; *Bagnall v. The London and North Western Railway Company*, 1 H. & C. 544; *Bush v. Martin*, 2 Id. 311; *Duncan v. Findlater*, 6 Cl. & F. 894; *Ferguson v. The Earl of Kinnoul*, 9 Id. 251; *The Feoffees of Heriot's Hospital v. Ross*, 12 Id. 507; *The Great Western Railway Company of Canada v. Braid*, 1 Moo. P. C. C. N. S. 101; *Meek v. The Whitechapel Board of Works*, 2 F. & F. 144.

Cur. adv. vult.

The Judges, differing in opinion, now proceeded to give judgment separately.

MELLOR, J.—The defendant in this case was the clerk to the Commissioners for carrying into execution stat. 7 & 8 Vict. c. cvi., being “An Act for improving the drainage and navigation of The Middle Level of the Fens.” The plaintiff was the proprietor of lands which were submerged and damaged by an inundation of the tidal waters of the sea, occasioned by the failure of certain works made and erected by the Commissioners under the provisions of the Act above mentioned.

The cause was tried before Lord Chief Justice Erle at Norwich. The jury, in answer to questions put to them by the learned Judge, found that the plaintiffs had sustained damage; in the first place by the absence of due care and skill on the part of the Commissioners in respect of the maintaining of a certain sluice erected by the Commissioners; in the second place, by the absence of such due care and skill in not providing remedies against mischief after the sluice was destroyed; and in the third place, by reason that the puddle clay wall was not made.

And the question is whether or not, upon these findings of the jury, in connection with the evidence given in the case, and the summing up of the Judge, the Commissioners are liable for the negligence and improper conduct *of the contractors, agents, and servants employed by them to make and maintain the works which they were authorized and required to construct “and maintain” under the provisions of the above-mentioned Act; there being no finding by the jury that the Commissioners had negligently or improperly employed unskilful or incompetent contractors or agents in the making or maintaining of such works, or had any notice or knowledge that the banks referred to in the 137th section of the Act had been constructed without a puddle clay wall in or near the centre thereof, as required by that section.

Upon the best consideration which I have been able to give to this

case, I am of opinion that the Commissioners being trustees for public purposes, and acting without reward, and deriving no tolls or profits from the works so made and executed, nor possessing any means of raising funds, except for the specific objects of the Act, are not liable in this action. I do not deny that trustees or Commissioners acting for public purposes without reward and without income, may render themselves individually liable if they exceed or abuse their powers; nor do I dispute that they may render themselves liable in their representative character, *Sutton v. Clarke*, 6 Taunt. 29 (E. C. L. R. vol. 1), *Boulton v. Crowther*, 2 B. & C. 703, 709-11 (E. C. L. R. vol. 9), *Hall v. Smith*, 2 Bing. 156 (E. C. L. R. vol. 9), by acts or defaults negligently committed or made under their direct orders or with their direct sanction, in cases in which they have the power of reimbursing themselves out of rates or otherwise; but I doubt whether all the cases in which it has been decided that trustees or Commissioners may so become liable in the absence of any such power of reimbursement can be reconciled with the authorities by which I consider *myself bound. [*451 Each case must depend upon the particular provisions of the statute under which Commissioners or trustees are empowered to act, but it never could, as it appears to me, have been contemplated by the Legislature that a body of Commissioners gratuitously acting in the execution of a public trust, should be liable in an action for the incompetence or want of skill of contractors and agents, whom in the very nature of things they were obliged to employ, and whom they employed honestly believing them to be competent and skilful without at the same time making provision for enabling them to raise funds to answer claims arising from the employment of such contractors or agents.

The duty imposed upon the Commissioners in this case was not only to make but also to "maintain" the works, and if that was an absolute duty incumbent upon them under all circumstances, they have failed in the performance of it; but such failure was not owing to any negligence or unskilfulness on their part, and was simply due to the negligence and unskilfulness of the contractors and agents whom they employed believing them to be competent and skilful.

The words of the section which impose the duty must have a reasonable interpretation in connection with the scope and object of the Act, and the constitution of the body of Commissioners who were authorized to carry its provisions into effect.

It could not have been supposed that the Commissioners could make or maintain the works in question otherwise than by the employment of contractors and agents; and the real obligation resting upon them, as it appears to me, was *bonâ fide* to employ such contractors and agents as they believed to be skilful and competent. *Had it been intended to impose upon them the duty of maintaining the works [*452 in any other sense, I should have expected to have found in the Act some provision for levying rates to meet the possible consequences of failure. I can find no such provisions, and I am driven to the conclusion that the duty imposed upon the Commissioners by the Legislature was not an absolute duty to maintain the works under all contingencies, but merely to take reasonable measures and to exercise due care and skill in appointing proper agents and contractors for that purpose. There are cases, such as *The Southampton and Itchin Bridge Company*.

v. The Local Board of Health of Southampton, 8 E. & B. 801 (E. C. L. R. vol. 92), in which Commissioners have been held liable in their representative character for actual negligence admitted on the record, without it also appearing that they had funds out of which they could reimburse themselves in respect of damages and costs; but in the case of *Ruck v. Williams*, 3 H. & N. 308, which followed and professed to be in great measure governed by it, it appears to have been assumed by some of the Judges that in each case the Commissioners had the means of reimbursing themselves out of rates; and it is to be observed that in *The Southampton and Itchin Bridge Company v. The Local Board of Health of Southampton*, Lord Campbell and Wightman, J., rely upon sect. 139 of The Public Health Act, 1848, 11 & 12 Vict. c. 63, which empowered the Board to tender amends as implying that an action might be maintained against the Board "for a wrong."

The cases on this subject are not all easily reconcilable, but those which establish the liability of trustees or Commissioners acting gratuitously in the execution of a public trust may be classed as follows:—

*453] Firstly. Cases of individual liability where trustees or Commissioners have exceeded or abused their powers. Secondly. Cases in which the duty or obligation imposed upon such trustees or Commissioners has been violated by reason of directions or orders given by them for the doing of the very acts from which damage to others has resulted. Thirdly. Cases of Commissioners, trustees, or corporations authorized to construct or maintain works for trading, or the like profitable purposes; such as dock trustees, corporations acting as proprietors of gas or water works, and the like; in which cases, although they may act without reward, yet the object of their incorporation or constitution is to make and maintain works yielding profitable returns, either by tolls and dues or payment for services rendered, and in their very nature are mere substitutions on a large scale for individual enterprise.

There is really no sound distinction between such bodies and ordinary trading corporations, such as railway and canal Companies, banking Companies, market Companies, &c. It is true that, in cases like *Gibbs v. The Trustees of the Liverpool Docks*, 3 H. & N. 164, and *The Mersey Docks Board v. Penhallow*, 7 H. & N. 329, the trustees, although receiving tolls and dues for the use of their works, were themselves unsalaried, and the surplus of the profits earned from time to time was paid over to public objects; still they were constituted or incorporated for the very purpose of earning profits, by the use which was to be made of their works. To the extent of their earnings from the works so made and maintained it would have been highly impolitic to exempt *454] them from a liability to which all individual owners of similar works are subject; they kept open their dock to the trading public for reward when it was in a dangerous condition, and inasmuch as they had the means of knowledge that it was so, and took no measures to obviate the danger, the maxim, "respondeat superior," was properly applicable to such a case. *The Mersey Docks Board v. Penhallow* does not govern the present case, which falls within the reasoning of *Hall v. Smith*, 2 Bing. 156 (E. C. L. R. vol. 9); *Duncan v. Findlater*, 6 Cl. & F. 894; *Holliday v. St. Leonard's, Shoreditch*, 11 C. B. N. S. 192 (E. C. L. R. vol. 103), and other similar authorities. The Commissioners here are authorized for public objects to erect and maintain great works

of drainage and navigation. They derive no other profits from the execution and maintenance of the works than a share in the beneficial results anticipated therefrom. The funds for their construction and maintenance are raised by rates imposed upon the districts supposed to be benefited thereby; but no business is authorized to be carried on for profit, nor are any tolls authorized to be taken for any use of the works. The object is public, although the direct benefit is local. It is not in any respect analogous to trading, or carrying, or affording dock accommodation for profit. The Commissioners have no property except such as is strictly incident to the machinery for making and maintaining the works and raising the necessary rates, and they have no power to levy a rate for any other purpose. In trading and profit-earning corporations it is reasonable that the funds to be earned should be applicable to all the consequences of their business, but here the only funds authorized to be raised are strictly *limited to the construction and maintenance of the works. This appears to me to amount to a strong [*455 indication that it was never contemplated by the Legislature that the Commissioners were to be liable under circumstances like the present. Most of the cases on this subject were reviewed by the Court of Common Pleas in *Holliday v. St. Leonard's, Shoreditch*, 11 C. B. N. S. 192 (E. C. L. R. vol. 103), in which Byles, J., who tried the cause of *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (E. C. L. R. vol. 100), so much pressed in the argument before us, explains at p. 208, that in that case "the defendants were personally cognisant of and parties to the works which caused the injury," and so distinguished it from the case under consideration. It is not necessary for me to examine the authorities in detail, but it will be found that all those which establish the liability of trustees, commissioners, or persons clothed with the gratuitous execution of a public trust, are included in one or other of the classes above referred to. As was said by Lord Cottenham, in the case of *Duncan v. Findlater*, 6 Cl. & F. 894, p. 908, "Cases may possibly be supposed in which the funds raised by a statute would be liable for acts done strictly in pursuance of the directions of that statute, but none in which such funds would be liable for acts done without the authority of the statute."

It was however strenuously contended on the part of the plaintiff that, although a judgment in his favour might be fruitless, owing to the absence of any funds out of which it could be satisfied, or the means of raising any, that he was nevertheless entitled to such judgment; and he argued that various provisions of stat. 7 & 8 Vict. c. cvi. showed it was contemplated that actions might be brought against the Commissioners for acts, &c., *done by them; and expressly exempted them from [*456 personal liability, except in cases of "wilful neglect or default," and in all other actions or suits directed that executions on any judgment or decree should be executed against the goods and chattels of the Commissioners belonging to them by virtue of their office. There may be cases in which, although there are no existing funds or means of raising any to satisfy a judgment, it is no answer to an action brought on a deed or contract expressly authorized to be entered into or for an act within the scope of the authority of Commissioners to do, and to which they might lawfully apply their funds if they had any, Pallister

u. The Mayor of Gravesend, 9 C. B. 774, *Kendall v. King*, 17 Com. B. 483, but I do not consider them analogous to the present.

With a view to see how the argument urged on the part of the plaintiff applies to the present case, it may be well to consider the effect of the provisions referred to which provide for the indemnity of the Commissioners out of the moneys to be raised by virtue of their Act. By sect. 19 of stat. 7 & 8 Vict. c. cvi. it is enacted that nothing in any "deed or contract" by the Act authorized to be made by the Commissioners, for the purposes of the Act, should charge or affect the persons of the Commissioners or their own lands, &c., "with or for the performance of anything contained in any such instrument;" but, that all damages, &c., in any action in consequence of such instrument, or which any such Commissioner should "*otherwise be put to by virtue of this Act,*" "shall be discharged out of the moneys to arise by virtue of this Act," &c., "*unless such action or suit, or any such damages, &c., have* *457] *arisen in consequence of wilful neglect or default on the part of the Commissioner incurring the same.*" Then by sect. 20 it is enacted that in all actions, &c., in respect of any matter or thing relating to the execution of this Act, by or against the Commissioners, it shall be sufficient to state the names of any two of the Commissioners or the name of their clerk as plaintiff or defendant. It then by sect. 21 provides that executions are to be executed against the goods and chattels of the Commissioners by virtue of their office; and by sect. 22 indemnifies the Commissioner or clerk in whose name suits may be brought or defended out of the moneys in the hands of the treasurer against all suits and costs, and enacts that "no such Commissioner or clerk shall be personally liable for payment of the same, unless such action, &c., have arisen in consequence of his own wilful neglect or default."

It appears to me that these clauses of the Act are strong to show the nature of the liability which the Commissioners may be called upon to bear in acting in the execution of this Act. They must necessarily enter into deeds and instruments, make contracts, and employ agents; the statute therefore provides that all liability to arise in consequence of such instruments, or which any such Commissioners shall otherwise be put to, shall be discharged out of the moneys to arise by virtue of the Acts, unless the same be the consequence of "wilful neglect or default on the part of the Commissioner incurring the same." These are the only provisions which regulate the indemnity of the Commissioners; and it cannot be supposed that the Legislature could have contemplated any other liability than that arising out of the execution of deeds and instruments, and the employment of contractors and agents for the execution of the works, and raising the necessary funds; or a *458] **liability arising out of the wilful acts, neglects, and defaults of the Commissioners.* The former liability was imposed on the funds to be raised under the Act, the latter was to be borne by the individual Commissioners.

There is no third course apparently contemplated by the Act; and I think that these provisions tend to show that the remedy of the plaintiff cannot be against the Commissioners personally, inasmuch as they have been guilty of no "wilful neglect or default;" nor under the circumstances can it be against them in their corporate capacity because they

have no funds, nor the means of raising any, which they can apply to answer for damages arising to the plaintiff on any of the grounds of non-feasance or neglect imputed to them.

BLACKBURN, J.—In this case I have come to a conclusion different from that of my Lord and my brother Mellor, as I think that the rule obtained to set aside the verdict for the plaintiff ought to be discharged.

The action is against the clerk of the Drainage Commissioners for carrying into execution stat. 7 & 8 Vict. c. cvi., for improving the drainage and navigation of The Middle Level of the Fens, as representing the Drainage Commissioners.

The declaration, after referring to the 137th and 138th sections of the Act, which authorize the Drainage Commissioners to make a certain cut, and by which, amongst other things, it is enacted that the Drainage Commissioners shall “make and maintain a good and substantial sluice of brick and stone at or near the entrance of the said cut” “to exclude the tidal waters,” avers that the cut and sluice were made, and then sets forth by way of breach, that the Drainage Commissioners [*459 “so carelessly, negligently, unskilfully, and wrongfully conducted themselves in and about” inter alia “making and maintaining the said sluice good and substantial,” that in consequence the tidal waters burst in and flooded the plaintiff’s land.

The material plea was Not Guilty.

On the trial, before the Chief Justice of the Common Pleas, it was proved that the sluice did give way, and the tidal waters broke in, flooding the plaintiff’s land and occasioning much damage.

There was much evidence given as to the cause of this accident.

The Chief Justice left several questions to the jury. Their finding, so far as bears on the present point, was, that the damage to the plaintiff was not caused by the absence of due care and skill on the part of the defendants in respect of making the sluice; but they also found that it was caused by want of due care and skill on the part of the defendants in maintaining the sluice.

It is on this latter finding that I think the plaintiff entitled to retain his verdict, and I therefore omit noticing any other part of the verdict.

The Drainage Commissioners, from the nature of their body, could not do anything in the nature of maintaining the sluice except through the instrumentality of their officers, and of surveyors, engineers, and other agents acting for them; and it was argued, on behalf of the plaintiff, that therefore the finding of the jury must be understood as meaning that the defendants had negligently chosen incompetent persons to whom they had intrusted the superintendence of the maintenance of the works; but on looking at the evidence and the summing up, I think that the finding cannot be so understood.

*I think it must be understood as a finding that the sluice [*460 might by due skill and care have been maintained, and that due skill and care were not applied to maintain it. That was negligence on the part of those whose duty it was to cause due skill and care to be applied for that purpose, and if, as the plaintiff contends, that duty is cast on the Drainage Commissioners, it was negligence in them. The question whether that duty is imposed on the Drainage Commissioners depends on the true construction of the Act 7 & 8 Vict. c. cvi. and into that question I will inquire afterwards.

On the other hand, the defendant's counsel contended that, even if the duty were cast on the Drainage Commissioners, yet that they are Commissioners for public purposes, and as such (it was said) not liable for any acts and defaults of those employed by them, they could not be liable for a failure to maintain the sluice; a failure which could not have arisen except from the default of their engineers and surveyors and other persons in their employment, who ought to have seen the defects in the sluice and prompted the Commissioners to take the proper steps to remedy them. I do not however agree that such is the law with regard to public Commissioners.

There are, no doubt, several cases, which were cited during the argument, in which it has been said that public bodies are not responsible for the acts of those whom they employ; but all those cases were of the kind in which the liability of the employer depends entirely upon his standing towards those who actually did the wrong in the relation of master and servant. They are all cases in which the act authorized by the public body was in itself lawful, but those who were employed to *461] do that act were in the course of the employment guilty of negligence, from which the plaintiff suffered.

These decisions, or at least the greater part of them, might be supported on the ground that the relation of master and servant did not exist between the body sued and the person guilty of negligence, for the master is liable for his servants because he selects them and has control over them, and in many cases a public body has not this selection of and control over the officers whom it is *obliged* to employ; but this explanation does not apply to *Holliday v. St. Leonard's, Shoreditch*, 11 C. B. N. S. 192 (E. C. L. R. vol. 103), in which the Chief Justice of the Court of Common Pleas gives, as the ratio decidendi, p. 204, that "persons intrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no personal share in the mode of its performance, are exempted from liability for the negligent acts of the persons employed by them," which seems to me to express in other words that there is an exception from the general rule that masters are responsible for the negligent acts of their servants, when the master falls within the class somewhat indefinitely styled trustees for public purposes. I should therefore, if the Drainage Commissioners were sought to be charged for the collateral negligence of their servants, act upon that decision, leaving it to the plaintiff, if advised, to call on a Court of error to examine the foundation of this doctrine, and to inquire how far it is founded on principle or really established by authority; but the doctrine in question has, as it seems to me, no bearing on the present case, since the Drainage Commissioners are not sought to be charged for the collateral negligence of their servants, but for the non-fulfilment of a duty which was, it is alleged, *462] imposed by Act of Parliament on the Drainage Commissioners themselves.

In *Duncan v. Findlater*, 6 Cl. & F. 894, which was much relied on by the defendant, the point raised by the bill of exceptions, on which alone the House of Lords decided, was whether the jury were properly directed "that road trustees on a public road are liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers, or surveyors, or other persons employed by the trustees, or by the officers of the trustees, when engaged in any

operation performed under authority of the trustees." It would appear to have been at least doubtful whether the persons by whose negligence the injury was occasioned were not the servants of a contractor, and it certainly does not at all appear that they were the servants of the trustees, so that no doubt the exception was well founded. The Lord Chancellor (Lord Cottenham), however, in giving judgment in the House of Lords, intimates an opinion, that a body by Act of Parliament created and endowed with funds for a particular purpose can never as such be liable to pay damages at all, inasmuch as either the act was justified by the statute under which the body acted, or was a wrong for which the trustees who ordered it might be responsible as individuals, but for which the trustees as such could not be liable, on the ground that such a liability would have the effect of diverting the trust funds from the statutable object. This, however, was not the decision of the House of Lords. It was merely the opinion of the Lord Chancellor, which (though delivered in a Scotch case, not an English one) is entitled to great respect and weight, but which is not binding upon us as a *decision. And there have subsequently been several express [*463 and positive decisions of our own Courts opposed to the opinion thus intimated by Lord Cottenham, which, as it seems to me, establish that such a body may, in their corporate capacity, be guilty of wrongs for which judgment will go against them. Amongst these are *The Southampton and Itchin Bridge Company v. The Local Board of Health of Southampton*, 8 E. & B. 801 (E. C. L. R. vol. 92); *Ruck v. Williams*, 3 H. & N. 308; *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (E. C. L. R. vol. 100); and *Brownlow v. The Metropolitan Board of Works*, 13 C. B. N. S. 768 (E. C. L. R. vol. 106); which last case has been recently affirmed in the Exchequer Chamber, 16 Id. 546. In all these cases the plaintiffs obtained judgment for damages against public corporate or quasi corporate bodies for acts done by them in excess of their powers. The respective bodies corporate did not do the acts personally in one sense, for a body corporate never can literally do anything itself, but the wrongful acts complained of were the personal acts of the corporations in the sense that the corporations directed those acts to be done, and were not merely fixed with the unauthorized and unintended negligence of their servants.

In the present case the charge against the defendants is not one of malfeasance but one of neglect of a duty imposed on them; in this respect it very closely resembles *The Mersey Docks Board v. Penhallow*, 7 H. & N. 329. There the defendants were a public body who kept open a dock. It had been held by the Exchequer Chamber, in the previous case of *Gibbs v. The Trustees of the Liverpool Docks*, 3 H. & N. 164, that the law cast upon them the same duty that it would have cast upon any other body keeping open a dock or canal, *viz., to take rea- [*464 sonable care so long as they kept it open for the public use of all who might choose to navigate it, that they might navigate it without danger to their lives or property. The issue at the trial was on Not Guilty, whether the Mersey Board had neglected this duty. The Lord Chief Baron directed the jury that, if the defendants *by their servants* had the means of knowing the state of the dock and were negligently ignorant of it, the defendants were liable. This ruling was held right by the Court of Exchequer Chamber. The House of Lords may yet

reverse that decision, but while it stands it seems to me to reduce the inquiry in the present case to the one question, whether stat. 7 & 8 Vict. c. cvi. has imposed on the Drainage Commissioners a duty to take due care that the sluice was maintained as unqualifiedly as the duty which the law cast on the Mersey Board to take due care that their docks were reasonably safe. Now sect. 138 is in the following terms: "That the said Drainage Commissioners shall make *and maintain* a good and substantial sluice of brick and stone at or near the entrance of the said cut into the river Ouse, with two or three openings, the waterways of which shall not altogether be less than fifty feet, and with doors to each of the said openings of sufficient height to exclude the tidal waters." Nothing has been pointed out on the argument, and I have not myself discovered anything to qualify this enactment, which certainly seems to me to cast upon the Drainage Commissioners the duty to maintain this sluice. The common law gives a right of action against those neglecting a duty cast upon them to those who, in consequence, sustain damage. I entirely assent to the position that if the Legislature have shown an *465] intention to prohibit this right of action in the present case that will effectually prevent it, and I agree that such an intention need not be shown in express words if it can be collected from the whole Act, but I think that the onus lies on the defendants to show that it was intended to prevent the right of action, and not on the plaintiff to show that it was intended to give it.

Now the Commissioners are a large and fluctuating body whom it would be very difficult to sue at common law as a body; and it would be very harsh and impolitic (for the reasons given in *Hall v. Smith*, 2 Bing. 156 (E. C. L. R. vol. 9),) to make the individual Commissioners responsible out of their private means for the defaults of the body: but the Legislature being aware of this, have (as is now almost universally the case in Acts of this sort) provided, by sect. 20, that the Commissioners may be sued by their clerk in respect of anything relating to the execution of the Act, and, by sect. 21, that execution on any judgment thus obtained against them shall be executed against the goods and chattels belonging to such Drainage Commissioners by virtue of their office.

It certainly seems to me that, if it were necessary to show affirmatively an intention on the part of the Legislature that judgment might be obtained and execution issue against the Commissioners as a body, those sections would go far to show it. It is very true that the execution under the 21st section, which would be a sufficient remedy for any judgment for a small sum, would prove perfectly inadequate to meet such a very large liability as is involved in the present claim, and that the effect of judgment against the Drainage Commissioners would probably be to make them insolvent: that however *466] does not show that the Legislature intended to take away the right to obtain judgment, and is not a ground on which we can, as I think, refuse to give the plaintiff the judgment he is entitled to. He will no doubt wish to raise the question whether he cannot compel the Drainage Commissioners to make a rate for the purpose of liquidating his claim. I do not mean to express any opinion now prejudging that question. I think it premature to do so, and that we should, as in *The Southampton and Itchin Bridge Company v. The Local Board of Health of Southampton*,

8 E. & B. 801 (E. C. L. R. vol. 92), give judgment for the plaintiff without deciding it at all: but even if it were decided against the plaintiff, that would not in my opinion afford any ground for depriving him of his right to obtain what he can by execution under sect. 21; and of the benefit he may derive from his improved position before a committee of either House of Parliament in case there be any further legislation on the subject.

For these reasons I think the rule should be discharged.

COCKBURN, C. J.—This is an action brought against the defendants, as Commissioners of the drainage of The Middle Level of the Fens, for injury sustained by the plaintiff, by reason of the defendants not properly constructing and maintaining a sluice which, as such Commissioners, they were bound under the Act of the 7 & 8 Vict. c. cvi., to make and maintain at the point where the waters of the Middle Level, after being conveyed by a cut across the Marshland district, are discharged into the river Ouse; as also for omitting to make a puddle clay wall along the line of their embankment as required by the Act of Parliament.

*By the finding of the jury the defendants were absolved from all charge of omission or negligence in respect of the original [*467 construction of the sluice, but the jury found that there had been want of due care and skill on the part of the defendants in respect of maintaining the sluice, and in respect of providing remedies against mischief after the sluice was destroyed. The jury also found, as the fact was, that there had been an omission to construct the puddle clay wall; but, as the disaster which gave rise to the present action arose, not so much from the absence of the puddle clay wall as from the giving way of the sluice, this finding becomes of minor importance.

As regards each of these heads of default, however, the question for our decision on the leave reserved at the trial is, whether the case ought not to have been withdrawn from the jury on the ground that on the admitted facts, with reference to the circumstances in which the defendants as Commissioners of the drainage are placed, they were in point of law exempt from liability.

The effect of the decisions in the cases of *Hall v. Smith*, 2 Bing. 156 (E. C. L. R. vol. 9), *Duncan v. Findlater*, in the House of Lords, 8 Cl. & F. 894, and of *Holliday v. St. Leonard's, Shoreditch*, 11 C. B. N. S. 192 (E. C. L. R. vol. 103), is to establish the position that persons intrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no personal part in its performance, and having no funds at their disposal out of which compensation for injury arising from the negligent acts of the persons employed by them can be made, are exempted from liability in respect of such *neg- [*468 ligence. The question in the present case is whether the defendants, as Commissioners of the drainage of the Middle Level, are so circumstanced as to be entitled to immunity within the rule referred to. The cases cited are binding upon us, and if the present case falls within them the defendants will be entitled to our judgment.

The defendants are Commissioners appointed and acting under Acts of the 50 G. 3, c. 125 (local and personal), and 7 & 8 Vict. c. cvi., for improving the drainage and navigation of The Middle Level of the Fens. Their powers and functions in respect of the drainage are en-

tirely distinct from those which are incidental to their office as Commissioners of the navigation; and it is as Commissioners of the drainage that they are sought to be made liable in the present action.

The Drainage Commissioners appointed under these Acts took no part personally in the original construction of the works, nor have they ever done so as regards the maintenance of the works or management of the drainage. They are not persons specially named or selected for the purpose. Every landowner in the district is, as such, a Commissioner; nor is there any option on the part of persons duly qualified to decline the office. It is of course impossible that such a body of persons can themselves personally execute the duties cast upon them by the Acts of Parliament: all that they can do is to appoint competent persons by whom these duties may be performed. Accordingly, the questions left to the jury were, whether there had been want of due care on the part of the defendants in selecting the persons employed by them, and whether there had been want of due care and skill on the part of the persons so employed. Reading the verdict by the light of the *469] evidence, we must take it that it was on the latter hypothesis that the verdict against the defendants proceeded. This case, therefore, stands clear of the decisions in *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (E. C. L. R. vol. 100), *The Southampton and Itchin Bridge Company v. The Local Board of Health of Southampton*, 8 E. & B. 801 (E. C. L. R. vol. 92), and *Ruck v. Williams*, 3 H. & N. 308, in which the negligence imputed to the defendants was of a personal character. In none of those cases was the negligence for which the defendants were sought to be made liable that of their servants only—in all of them the fact was, or was assumed to be, that the defendants had themselves personally interfered in the work, and had been themselves guilty of the negligence complained of.

The defendants are therefore so far within the rule, laid down by Erle, C. J., in *Holliday v. St. Leonard's, Shoreditch*, 11 C. B. N. S. 192 (E. C. L. R. vol. 103), as to the immunity of persons exercising public duties that they are appointed by Act of Parliament for the discharge of duties which they cannot themselves personally execute, and in the performance of which they are therefore compelled to employ others.

It is, however, contended, on the part of the plaintiff, that the defendants are not Commissioners appointed for a public purpose so as to come within the rule entitling such persons to exemption from liability.

In support of this proposition it is urged that the drainage of the district in question is matter of local rather than of general or public concern; its sole purpose being to drain and improve the lands within that district alone. The case is therefore said to come within the principle of the decisions in *Reg. v. Badcock*, 6 Q. B. 787 (E. C. L. R. vol. 51), and *The Birkenhead Dock Trustees v. The Birkenhead Overseers*, 2 E. & B. 148 *470] (E. C. L. R. vol. 75), in which it was held that property vested in trustees for the benefit of a local district is rateable to the relief of the poor in the parish in which it is locally situate, as not being sufficiently appropriated to public purposes to be exempt from rateability. It does not, however, appear to me that these cases, which were decided with reference to rateability alone, are at all conclusive on the present point. All property from which a benefit or profit accrues ought, under the

statute 43 Eliz. c. 2, to contribute to the relief of the poor. To this liability an exception has, however, been established in the case of property devoted to public purposes. But the propriety of this exception has in recent times been questioned, on the ground that every such exemption necessarily throws an additional burden on other property in the parish; and the tendency of modern decisions has been to confine the exemption within the narrowest possible limits, and to restrict it to those cases in which the purpose to which the property is appropriated is public in the largest sense of the term; that is, where it is held for the benefit of the entire public as distinguished from any portion of the public however extensive. This rule does not appear to me to be applicable to the case of trustees or Commissioners acting for an extensive district in a matter of general and not of individual concern. The drainage of an extensive district, without which a vast tract of valuable land would be reduced to the condition of marsh and fen, and would thus be withdrawn from the producing power of the country, is, I think, sufficiently a matter of public and general concern to entitle those who are intrusted with the construction and management of the works necessary for such a purpose to the *character of public Commissioners, [*471 and to the immunity to which it is now settled that trustees or Commissioners for public purposes are entitled.

In like manner it was contended for the plaintiff, that one of the conditions of the immunity of persons employed for a public purpose being, according to the rule laid down by Erle, C. J., in *Holliday v. St. Leonard's, Shoreditch*, 11 C. B. N. S. 192 (E. C. L. R. vol. 103), that the services should be gratuitous, this condition was not satisfied in the present case, inasmuch as the Commissioners, although receiving no salary or other direct remuneration for their services, yet, as owners of land within the district, received a benefit from the improvement of their land by the drainage. But a remote and indirect benefit of this kind, incidentally arising from the works, and not received by the Commissioners as a remuneration for their services, is not, as it seems to me, sufficient to take the case out of the rule as to immunity above referred to.

In my judgment, however, the main criterion in these cases is whether there is any fund at the disposal of public trustees or Commissioners available for the payment of damages in respect of injury occasioned by negligence. Not, indeed, that I feel the force of the reasoning of Best, C. J., in *Hall v. Smith*, 2 Bing. 156 (E. C. L. R. vol. 9), that no one would undertake public duties without remuneration if liable for the negligence of servants; inasmuch as it is not pretended that public trustees or Commissioners can be made to answer in damages out of their own private funds. The ground on which my judgment proceeds is that, it being admitted that public trustees or Commissioners cannot be made liable in their individual character, the fact that the Legislature has *appropriated the funds in their hands to specific objects, so as to [*472 exclude their application to the payment of damages, leads fairly to the inference that the trustees or Commissioners cannot be held liable in their aggregate or quasi corporate character. In *Holliday v. St. Leonard's, Shoreditch*, Byles, J. says, p. 208: "Here, the defendants are public officers acting gratuitously and compulsorily, and having no funds out of which the damages could be paid; and the cases show, that, under such circumstances, being guiltless of personal negligence, they are not liable."

The absence of any such funds was strongly insisted on by Lord Cottenham, C., in his judgment in *Duncan v. Findlater*, 6 Cl. & F. 894. He there says, pp. 907-8: "It is impossible to suppose that the framers of this statute contemplated that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the trustees. If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption that the act creating the damage being within it, the statute must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by the statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct? Cases may possibly be supposed in which the funds raised by a statute would be liable for acts done strictly in pursuance *473] of the directions of that statute, but none in *which such funds would be liable for acts done without the authority of the statute."

It is true that in the present case there are no prohibitory words such as occur in the General Turnpike Act, and which were therefore present in *Duncan v. Findlater*, 6 Cl. & F. 894; but it appears to me that where a statute directs a fund to be raised, and expressly directs its application to specific purposes, this has by implication the effect of prohibiting the application of the fund to any other purpose.

Now, these Commissioners are directed to execute and maintain the works specified by the Acts, and they are empowered to levy taxes prescribed by the Acts on lands within the district. The purposes to which the funds thence arising are to be applied are set forth in the 30th and 38th sections of the 50 G. 3, c. 125 (local and personal), and the 237th section of the 7 & 8 Vict. c. civ. In the two former the funds are specifically appropriated to the purposes therein referred to. The language of sect. 237 of the 7 & 8 Vict. is somewhat more general. It directs that, after defraying the expenses of the Act the funds shall be applied to "executing and completing the said several works of drainage, and the several other works, matters and things by this Act required to be made, done, and executed by the said Drainage Commissioners, and *for the general purposes of carrying this Act or the said recited Act, or either of them, and the said recited Act into execution.*"

It is on the concluding words of this section alone that it can be contended that damages recovered in an action for default or negligence could be paid out of the funds to be raised by the Commissioners. But *474] I am of *opinion that such a charge cannot properly be considered as one of the general purposes of carrying the Acts into execution. It cannot be presumed that the Legislature contemplated that the Commissioners, or those employed by them, would be guilty of breach of duty or negligence in the discharge of their duties. And this view is confirmed by the circumstance that, by the 217th section of the 7 & 8 Vict. c. civ., provision is made for compensation where "any person or body, at any time after the said Drainage Commissioners, or any person employed or authorized by them, shall have begun to carry this Act into execution, shall happen to sustain any damage or injury in his lands, tenements, or hereditaments, goods or chattels, by or in conse-

quence of any act of the said Commissioners for Drainage, or their agents, workmen, or servants, for which such person shall have had no recompense or satisfaction, or for which no recompense or satisfaction is hereby otherwise provided." A positive appropriation of the funds to be raised by the Commissioners being thus made by the Act, this appropriation, as I have before said, has by implication the effect of negating the authority of the Commissioners to apply the funds in payment of damages. Besides this, the Act contains, in sect. 239, a provision for the reduction of the taxes which the Commissioners are empowered to levy to one-half or one-third of the amount, so soon as the works shall be executed and the debts discharged. Such a provision was held in *Rex v. The Inhabitants of Liverpool*, 7 B. & C. 61 (E. C. L. R. vol. 14), to be a ground for holding that the dock rates and duties authorized to be taken by Act of Parliament were not even rateable to the relief of the poor. Lord Tenterden, *in giving judgment, says, p. 69, [*475 "The statute under which the dock rates in question are levied does not indeed contain an express direction that the rates shall be applied to the purposes specified, and no other; but it directs that certain burdens shall be discharged, and that then the rates shall be lowered; and, therefore, any application of those rates to other purposes not specified, would be a direct violation of the statute."

We were pressed on the argument with the authority of the decision in the case of *Scott v. Mayor of Manchester*, 2 H. & N. 204. But the present case is obviously distinguishable, inasmuch as there the trustees were in the receipt of profits beyond the amount necessary for the primary and immediate purpose of the statutory powers, and applicable to the benefit of the town of Manchester. The defendants were thus in the nature of a trading corporation. In the present case the taxation is imposed expressly for the execution of the works, without any provision directing the application of the surplus (if any) to any ulterior purpose, or to the benefit of any one.

It has, indeed, been suggested that, whether there be funds applicable to the payment of damages and costs recovered in an action or not, a plaintiff who has sustained an injury is still entitled to bring his action, and to proceed to judgment and execution, although it may be known all along that such a proceeding must necessarily be barren of any profitable result. It appears to me that such a position is untenable. It would be to bring the law into contempt to suffer an action to be maintained where, if the plaintiff succeeds, the judgment cannot possibly be satisfied either by taking *the person or property of the defendant, [*476 or by any other means. A result so absurd in itself is a strong ground for applying the principle of total immunity to such a case. But, besides this, if such an action were allowed to be maintained, property, which ex hypothesi cannot be applied in compensation of the injury complained of, might be taken in execution of the judgment. If judgment were obtained against the Commissioners, funds in their hands, or property necessary for the execution of their powers, might be taken in execution under it; and this although the Act of Parliament under which the public trustees or Commissioners were appointed might have expressly prohibited the application of the funds to any other purpose than the purposes of the Act. Besides which, the defendants in such an action would necessarily be put to expense in defending it, and would

either be compelled to pay those expenses out of their own pockets, to which it is admitted they ought not to be liable, or would pay them out of the public funds, which on the hypothesis ought not to be applied to such a purpose.

The case of *Gibbs v. The Trustees of the Liverpool Docks*, 3 H. & N. 164, and *The Mersey Docks Board v. Penhallow*, 7 H. & N. 329, may appear to militate against this view, inasmuch as in those cases the defendants were held liable for negligence although the rates and tolls leviable by them were appropriated by the Acts, and there was therefore no fund available to satisfy the judgment. It may be observed, that the point as to the absence of funds to satisfy the judgment does not appear to have been taken by the counsel, or to have been adverted to by the Court. But, assuming that this difficulty would not *477] have altered the decision in the cases referred to, the present case may be distinguished from them on the ground that the cause of action on which the plaintiffs in those cases succeeded was the personal negligence of the defendants; the trustees being held liable, not upon the ground of any default or negligence in the execution of their duties under the Act, but from the wrongful act of keeping the dock open and inviting vessels to enter it when it was in an unfit and dangerous condition. The distinction between those cases and the present is that which I have already pointed out as distinguishing this case from *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (E. C. L. R. vol. 100), namely, that the defendants are here sought to be made liable, not for their own default, but for that of persons in their employ. It is true that by the declaration the defendants are charged with breach of duty in not constructing and maintaining the works. But the form in which the declaration is framed cannot alter the substance of the thing, or enlarge the liability of the defendants. As we have seen, the Commissioners cannot discharge their duties personally, and are obliged to employ contractors, engineers, and other servants for the purpose. And the question left to the jury, although in form general, as to whether there had been due care and skill in maintaining the sluice, or in providing remedies when the sluice was destroyed, which at first sight might appear to have had reference to the defendants themselves, came, under the directions and observations of the learned Judge, in effect to be, whether there had been due care and skill on the part of the defendants' servants.

*478] The case appears to me, therefore, in all respects, to *fall within the principle of the decisions in *Duncan v. Findlater*, 6 Cl. & F. 894, and *Holliday v. St. Leonard's, Shoreditch*, 11 C. B. N. S. 192, by the authority of which we are bound; and I am consequently of opinion that the defendants are not liable, and that this rule should be made absolute.

Rule absolute.(a)

(a) An appeal is pending.

**The WEST RIDING and GRIMSBY Railway Company, Appellants,
The Local Board of Health for the District WAKEFIELD, Re-
pondents. June 8.**

Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 58.—Use of highway.—Railway Company.—Contractor.

The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 58, enacts, "if in the course of making the railway the Company shall use or interfere with any road they shall from time to time make good all damage done by them to such road;" and if any question shall arise as to damage or repair, it shall be referred to two justices; and they may direct such repairs, and within such period, as they think reasonable, and may impose on the Company for not repairing a penalty, which shall be paid to the surveyor, &c., of the road interfered with if a public road, or to the owner if a private road: provided that in determining any such question with regard to a turnpike road the justices shall make allowance for any tolls paid by the Company on such road in the course of the using thereof: Held, that justices had power to make an order upon a railway Company to repair highways which they had used by the carriage of materials over them for making the railway and works, although the materials were carried in the carts of contractors or of other persons employed by them.

CASE stated by justices under stat. 20 & 21 Vict. c. 43.

At a Petty Session holden at Wakefield, in the West Riding of Yorkshire, on the 1st February, 1864, an information and complaint was preferred by James Witham, the clerk of and on behalf of the Local Board of Health for the district of the borough of Wakefield, [*479 *against The West Riding and Grimsby Railway Company, incorporated by The West Riding and Grimsby Railway Act, 1862, 25 & 26 Vict. c. ccxi.; charging, under sect. 58 of The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, that the appellants in the course of making a railway which they were, by The West Riding and Grimsby Railway Act authorized to make, did, on the 4th May, 1863, and on divers other days between that day and the 13th January, 1863, use and interfere with ten certain roads and parts of roads, being public highways, situate in the district and in the information and complaint described, and thereby damaged the same, namely caused the same to be out of repair, and that the appellants had often, since the 4th May last, been required to make good the damage so done, but had not made good the same or any part thereof, but that the same roads and parts of roads were still out of repair by reason of the use and interference aforesaid, contrary to the statute in that case made.

The appellants were, by their Act of Parliament, authorized to make a railway called The West Riding and Grimsby Railway, a part of which and of the works connected therewith passes through and is situate within the district of the respondents.

The appellants did not themselves make any portion of such railways and works, but they let the making of them through the whole of the district of the respondents to Messrs. Smith & Knight, of Great George Street, Westminster, contractors for public works. Messrs. Smith & Knight constructed a portion of those parts of the railway and the works connected therewith which lie within the limits of the district of the respondents, *and underlet the construction of the rest of those parts of the railway and works which lie within the limits of [*480 that district to one Pickles as their sub-contractor.

The roads named in the order were used and interfered with by the carriage of materials consisting of stone, bricks, timber and other

materials over the same, to be used and which were actually used in the making of the railway and works. A portion of such materials was conveyed in carts belonging to Messrs. Smith & Knight, the contractors, or in carts of other persons, hired by Messrs. Smith & Knight to convey such materials, or in carts of other persons from whom Messrs. Smith & Knight purchased such materials, and who were to deliver such materials to Messrs. Smith & Knight upon the railway or works free of carriage. Other portions of such materials were conveyed in carts belonging to the sub-contractor Pickles, or in carts of other persons hired and employed by him for that purpose, or in carts of other persons from whom the sub-contractor purchased the same, and who had to deliver such materials to Pickles on the railway or works free of carriage.

On the part of the respondents, it was contended that the contractors and sub-contractor, and those employed by them respectively to convey materials over the roads, were the servants of the appellants, and that the appellants were answerable for the use of and interference with the road by all of them.

On the part of the appellants it was contended, First. That the Company had not used or interfered with the roads within the meaning of sect. 58 of The Railways Clauses Consolidation Act, 1845. Secondly. That the contractors were independent parties and were in no sense *481] the servants of the Company; and thirdly, That they and the others employed by them had merely used the road in the same manner as all the public had the legal right to do.

The justices determined that the appellants were through their contractors liable to make good the damage done to eight of the roads named in the information to the extent of half the repair necessary to be done thereto, the amount of damage to the roads being proved to have been as much again as that occasioned by the ordinary traffic, and directed the appellants to do such repairs on or before the 13th June then next.

The question for the opinion of the Court was, whether the appellants used or interfered with the roads within the meaning of The Railways Clauses Consolidation Act, 1845, sect. 58?

Sect. 58 of The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20: "If in the course of making the railway the Company shall use or interfere with any road they shall from time to time make good all damage done by them to such road; and if any question shall arise as to the damage done to any such road by the Company, or as to the repair thereof by them, such question shall be referred to the determination of two justices; and such justices may direct such repairs to be made in the state of such road, in respect of the damage done by the Company, and within such period as they think reasonable, and may impose on the Company, for not carrying into effect such repairs, any penalty not exceeding 5*l.* per day as to such justices shall seem just; and such penalty shall be paid to the surveyor or other person having the management of the road interfered with by the Company, if a public road, and be applied for the purposes of such road, or if a private road *482] the same shall be paid to the owner thereof: Provided always, that in determining any such question with regard to a turnpike road the said justices shall have regard to and shall make full allowance for any tolls that may have been paid by the Company on such road in the course of the using thereof."

Cleasby (*Maule* with him), for the respondents.—By sect. 58 of stat. 8 & 9 Vict. c. 20, the burden of repairing the damage done to a road by the use of it in carting and conveying materials along it for the works of a railway is thrown on the company, whether the carts employed in conveying the materials belong to the Company or not, and whether the works are constructed by the Company or by a contractor. In *The London and North Western Railway Company v. Wetherall*, 20 L. J. Q. B. 337, 15 Jur. 247, an order of justices made under this section directing the plaintiffs to repair a highway of a certain length used by them in the course of making their railway was held good, the objections taken to it being that it did not specify the particulars of the damage, or what repairs were to be done.

Mellish, for the appellants.—First. The use and interference intended by sect. 58 of stat. 8 & 9 Vict. c. 20, are such as would be illegal if not authorized by Act of Parliament. [BLACKBURN, J.—That is so as far as regards an interference.] By sect. 53, “If, in the exercise of the powers by this or the special Act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, &c., either public or private, so as to render it impassable for or dangerous or extraordinarily inconvenient to passengers, &c., the Company shall, *before the [*483 commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road,” &c. The description of use intended in sect. 58 is the same as that in sect. 53, which is the using and occupying the road, not the ordinary use of it for passage. [He also referred to sect. 167.] Sect. 58 applies to private as well as public roads; and the Company have not a right to use private roads for traffic unless within the limits of deviation. [SHEE, J.—Sect. 30 gives them power to enter upon and use private roads within certain limits. BLACKBURN, J.—And the kind of use there intended is one for which compensation is to be given either in a gross sum or by half-yearly instalments.] That section gives “compensation for the use and occupation of” the road, which would be for the wear and tear of it. [BLACKBURN, J.—It is a reasonable bargain that the owners of a private road should be paid for the use of the road, and that it should be kept in repair by the Company.] On the construction contended for by the respondents there is no limit to the length of roads for the use of which the Company would be liable to pay compensation. [BLACKBURN, J.—Practically, sect. 58 would only be put in operation near the works of the railway. The proviso is a formidable difficulty in the way of the construction contended for by the appellants.] It seems to have been inserted without considering the enactment.

Secondly. The Company would be liable for an interference with the highway by a contractor; but the use of a highway by him is not a use of it by the Company; it is no part of the contract that the contractor should bring his materials by a particular road.

**Cleasby* was not called upon to reply.

BLACKBURN, J.—The justices were right, and their decision [*484 must be affirmed.

The first question does not admit of much elucidation. Sect. 58 says, “If in the course of making the railway the Company shall use,” which means in the ordinary sense of the word by travelling upon it, “or inter

fere with," which is a word of more extensive import, "any road, they shall from time to time make good all damage done by them to such road;" the words "from time to time" show that a use of the road while the works are going on is contemplated, and that the Company are to keep it in repair during that period. Then a wide discretion is given to justices as to the repairs which they may direct to be done. The difficulty is to say what repairs should be done by the public and what by the Company. And the justices may impose on the Company for not carrying into effect the repairs directed a penalty which is to be paid to the surveyor if a public road, or to the owner if a private road. The proviso which follows, furnishes a strong argument that the use of the road by the Company in the early part of the section means traffic upon it to an excess causing damage, and thereby occasioning extra repairs. A direction to the justices to take into account the tolls paid by the Company is insensible with reference to cutting through or taking part of a road for the purpose of the works of the railway. The proviso would be wild and strange unless the word "use" in the enacting part is understood in its ordinary sense; and it is so employed in sect. 30, relating to private roads. This construction makes intelligible the provision in that section for compensation for damage *to the owner
*485] of a private road, and the provision in sect. 58, for keeping roads in repair: it also gives sense to the other provision in that section, which, in the case of the use of a private road, gives the penalty to the owner of the road. In sect. 58, where the word "use" is brought in with other words importing interference, it probably means taking possession of the road, and not the causing it to be out of repair by the excess of traffic, because before the commencement of the operations, the Company are to substitute another road as convenient.

The next question is, whether the Company used the roads? They did not themselves use them, nor did their immediate servants use them; but they used them "in the course of making the railway" within the meaning of sect. 58. The Legislature in that section contemplated the ordinary effect of causing a large quantity of material to be carried over the roads for the purpose of making the railway;—it applies equally to the Company who put in motion the contractors as to the contractors themselves.

SHEE, J., concurred.

Judgment for the respondents.

IN THE EXCHEQUER CHAMBER.

GANDY and Wife v. JUBBER. [July 10, 1865.]

Nuisance.—Liability of reversioner.—Tenancy from year to year.

The owner of a messuage and premises, attached to which was an area, let the same to a tenant from year to year, and died; having devised the property, with an iron grating over the area improperly constructed and out of repair so as to amount to a nuisance, to the defendant. The defendant, having no notice of the nuisance, suffered the tenant to remain in the occupation of the premises, upon the same terms as before, receiving rent. The wife of A. having sustained damage by reason of the dangerous condition of the grating: held, by the Court of Queen's Bench, that the defendant, as reversioner, was liable to an action for the damage thereby occasioned. *Quære* by the Exchequer Chamber?

*THE defendant having appealed against the decision dis- [*486 charging the rule, and brought error on the judgment on the demurrer to the third and fourth counts in this case, reported ante, p. 78, the appeal and the error were argued, on the 16th June, before ERLE, C. J., WILLES and SMITH, JJ., and CHANNELL and PIGOTT, BB. KEATING, J., and MARTIN, B., were present during a portion of the argument.

Mellish, for the defendant.—The defendant is not liable. It does not appear how this nuisance originated, which may have been the consequence of the act either of the defendant, or of the prior owner of the reversion, or of the tenant in possession. And there was no contract for repair either by the landlord or the tenant. It is not even alleged that the defendant knew of this nuisance, and if he discovered its existence on the premises he had no right to enter and abate it.

There can be no doubt that whoever demises premises with a nuisance upon them is liable for mischief occasioned thereby. But the Court below erroneously considered a tenancy from year to year equivalent to a fresh demise every year: it may however be described either as a holding from year to year, or as a tenancy held for a certain number of years. In order to render the defendant liable a wrongful act must be shown, and it is absurd to say that the barely not giving a tenant notice to quit can be so designated. The person who suffers an accident in consequence of a nuisance on premises is not without remedy, for the occupier of the premises is liable, *Reg. v. Watts*, 1 Salk. 357; and there may be cases where he has his remedy both against the *occu- [*487 pier and the reversioner. [MARTIN, B., referred to 4 Bac. Abr. *Leases and Terms for Years* (L. 2), 7th ed., p. 832.]

Rosewell v. Pryor, 2 Salk. 460, 1 Ld. Raym. 713, (a) may be cited by the other side, but the true ground of that decision is that the defendant was the person who originally erected the nuisance. The only case raising any real difficulty is *Rex v. Pedly*, 1 A. & E. 822 (E. C. L. R. vol. 28). There an indictment for a nuisance was upheld under the following circumstances. The nuisance was created by two necessary houses and a sink, which were used by the tenants of some dwelling-houses let for short periods, who paid rent to the defendant. It did not appear whether any of the then tenants commenced occupying the dwelling-houses before the defendant began to receive the rents; but the necessary houses and sink were constructed and used by the tenants of those premises before his time. There was no distinct proof of any actual demise of the necessary houses and sink, but they had regularly been cleansed by the persons occupying the dwelling-houses, until the time of the nuisance, when the cleansing had been neglected. The nuisance had arisen since the defendant began to receive the rents. The only method of draining the places from which the nuisance proceeded would be by cutting through a close belonging to the defendant. Some evidence was given to show an implied admission by the defendant that he himself was bound to do the cleansing. But it has always been a matter of doubt on what ground that case proceeded. Lord Denman, in delivering judgment, says, p. 826, "The nuisance here has been a natural consequence of the nature of the erection; therefore, on the principle of *Rex v. Moore*, 8 B. & Ad. 184 (E. C. L. R. vol. 22), as well

(a) See also 6 Mod. 116; 12 Id. 215, 635.

*488] *as of the earlier case which shows that the receipt of rent is an upholding and continuing of the nuisance, the defendant is liable." But *Rex v. Moore* was not a case of a demise of land at all. The judgment of Littledale, J., was strongly relied on by the Judges in the Court below, where he says, p. 827, "I see no difficulty in this case. If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability: yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it. Here the periods are short, so that there has been a re-letting; and that has taken place after the user of the buildings had created the nuisance. This is, therefore, a case in which the reversioner is liable." No authority is cited by him. The language, "If, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability: yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord choose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable," must be understood of the case where one tenant has gone out and another come in. In *Penruddock's Case*, 5 Co. 100 b., it was held *489] that, if a feoffor creates a nuisance and *then parts with his premises, the feoffee of the party to whom the nuisance is done may have a quod permittat prosternere against the person who came in under the feoffor. [ERLE, C. J.—Abating a nuisance is proceeding against the nuisance, no matter who is in occupation. CHANNELL, B.—Re-letting for a short tenancy premises with a nuisance upon them might be evidence for a jury.] In *Rich v. Basterfield*, 4 C. B. 783 (E. C. L. R. vol. 56), Cresswell, J., in delivering the judgment of the Court, says, pp. 804–5, speaking of *Rex v. Pedly*, "Littledale, J., seems to have rested his judgment on the principle, that the landlord was not to let the land with the nuisance upon it; and he proceeds: 'Here, the periods are short, so that there has been a re-letting; and that has taken place after the user of the buildings had created the nuisance.' He therefore assumes that there was an existing nuisance at the time of the letting, which had not afterwards been removed. To his judgment, proceeding on that ground, we entirely assent; and probably Lord Denman meant the same thing, when he said that the receipt of rent was upholding *and continuing* the nuisance. * * * * * It appears to us, that, if a landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not; the landlord cannot be made responsible for the acts of the tenant; and *a fortiori* he would not be liable, if he had taken an obligation from the tenant not to use them so as to create a nuisance, even without reserving the right to enter and abate a nuisance, if created. * * * If, then,

The King *v.* Pedly is to be considered as a case *in which the defendant was held liable because he had demised the buildings [*490 when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance; or because he had undertaken the cleansing, and had not performed it;—we think the judgment right, * *. But, if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised,—we think it goes beyond the principle to be found in any previously decided cases; and we cannot assent to it.” In *Todd v. Flight*, 9 C. B. N. S. 377 (E. C. L. R. vol. 99), indeed the defendant was held liable, but it appeared that he had demised the premises, knowing that they were in a ruinous dangerous condition. All the above cases were there and cited, and Erle, C. J., in delivering the judgment of the Court, says, p. 390, “In the present case, it is alleged that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, and that he kept and maintained them in that state; and thus he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no default of the lessee, but by the laws of nature.”

Shaw (Montagu Chambers with him), for the plaintiffs.—The language of Littledale, J., in *Rex v. Pedly*, 1 A. & E. 822, 827 (E. C. L. R. vol. 28), applies to cases like the present, and has never been understood, as suggested by the other side, to relate solely to those where there has been a change of tenants. And it is supported by the language of Patteson, J., in *Tomkins v. Lawrance*, 8 C. & P. 729, 731 (E. C. L. vol. 34), “a tenancy from year to year is considered as recommencing every year.” In *Cattley v. Arnold*, 1 Johns. & H. 651, Wood, *V. C., [*491 pp. 657–8, reviews several of the previous authorities, and says, “The result of the two classes of authorities represented by *Legg v. Strudwick*, 2 Salk. 414, and *Tomkins v. Lawrance*, 8 C. & P. 729 (E. C. L. R. vol. 34), being, that it is competent to a person situated as supposed to adopt either course, *i. e.*, to declare on the demise either as a new or as part of the old contract.” In *Sugd. Real Prop. Statutes*, p. 60, 2d ed., “By the Statute of Frauds a lease by parol cannot exceed three years; but where a tenant from year to year continues in possession paying rent, a new tenancy springs up every year, and the lessor’s right under this 8th section (*i. e.* of the Statute of Limitations, 3 & 4 W. 4, c. 27) is renewed accordingly.” [SMITH, J.—Lord St. Leonards is there dealing with a positive statute.] A landlord is liable if he has a control over the premises which he neglects to exercise; and it is immaterial for this purpose whether he enjoys the property personally or in what relation he stands to the person actually occupying it, *i. e.*, a tenant or a servant, even though the premises may have been given to the servant to enable him the better to perform his duty: for who receives the advantage should bear the burden.

Payne v. Rogers, 2 H. Bl. 349, is an authority that if the owner of a house is bound to repair it, he, and *not the occupier*, is liable to an action for injury sustained by a stranger in consequence of its non-repair. This case, as well as *Rex v. Pedly*, 1 A. & E. 122 (E. C. L. R. vol. 28), is cited with approval in *Todd v. Flight*, 9 C. B. N. S. 377 (E. C. L. R. vol. 99). Erle, C. J., in delivering judgment, says, p. 389,

“These cases are authorities for saying, that, if the wrong causing the damage arises from the non-feasance or the mis-feasance of the lessor, *492] the party *suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law, and that it reconciles the cases.” It is difficult to see how an agreement between the landlord and tenant can affect the rights of strangers. Again, the owner of land in possession is liable for nuisances created on his land by others. [ERLE, C. J.—If a trespasser comes and creates a nuisance on my land, it is a strong thing to say that I am liable. WILLES, J.—Suppose a man, not my servant, places a heap of stones on a footpath through my land am I liable, though I had nothing to do with it? A ruinous house is different; for the public have a right to be protected against that. *Shaw* referred to *Corby v. Hill*, 4 C. B. N. S. 556 (E. C. L. R. vol. 93). ERLE, C. J.—A landlord may be responsible if there is a duty on him to abate a nuisance which he does not. If he lets the premises with a nuisance, all parties agree that he is responsible; but is he liable ipso facto because he is reversioner?] The present case does not go so far. In *Reedie v. The London and North Western Railway Company*, 4 Exch. 244, 256, Rolfe, B., delivering the judgment of the Court, says:—“It is not necessary to decide whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be, that in some cases he is so responsible. But then, his liability must be founded on the principle, that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance *493] to his *neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law ‘Sic utere tuo ut alienum non lædas.’” [WILLES, J.—There the landlord would be clearly liable, for he let the property for the purpose of carrying on a nuisance.] The American authorities go beyond ours. In *Bellows v. Sackett*, 15 Barbour 96, Johnson, J., says, p. 103: “Again; it is urged that the action cannot be maintained against the landlord, but should have been brought against his tenant in possession. But to make this objection available to the defendant, I think he should have shown that such tenant was bound to make repairs. The character of the tenancy is not shown, and, in the absence of all proof, I think we are not bound to presume, in this country, at least, that the tenant was bound, as between him and his landlord, to make the repairs. But however this may be, I am inclined to the opinion, that in any event, the plaintiff may resort directly to the owner, as the one who keeps up and maintains the erection, which causes the injury, whoever may be the temporary occupant under him.” [ERLE, C. J.—The burden of repairing there lay on the landlord, and there was nothing to show that he had transferred it to the tenant.] It is believed that the civil law, as well as the laws of Scotland and France, hold the landlord liable in cases like the present. [He cited *Inst.*, lib. 2, tit. 8.]

Mellish, in reply.—It is needless to inquire into the laws of other

countries. Not only had the defendant here no right to enter on these premises to abate a nuisance, *but it is consistent with the declaration that he merely held them as trustee for others. A nuisance [*494 might arise on land held from year to year at such a time that the landlord could not for several months compel the tenant to quit.

In *Payne v. Rogers*, 1 H. Bl. 349, the landlord had agreed to repair the premises, and there might be a difficulty even then, for, unless by special agreement, he could enter them without the consent of the tenant. *Bellows v. Sackett*, 15 Barbour 96, is not very intelligible, but probably there was a succession of fresh tenants.

Cur. adv. vult.

On the 17th June, the Court recommended the plaintiff to accept a *stet processus*. If this were not done, judgment would be delivered on the 10th July.

The parties having, after some delay, acceded to this,

ERLE, C. J., now said, as the plaintiff has consented to a *stet processus* it will not be necessary to deliver the judgment we have prepared.
Stet processus.

***MCCREA v. HOLDSWORTH and Others. June 10. [*495**

Copyright of Designs Act, 1858, 21 & 22 Vict. c. 70, s. 5.—Registration.—New design.

1. The Copyright of Designs Act, 1858, 21 & 22 Vict. c. 70, s. 5, declares "that the registration of any pattern or portion of an article of manufacture to which a design is applied, instead or in lieu of a copy, drawing, print, specification, or description in writing, shall be as valid and effectual to all intents and purposes as if such copy, drawing, print, specification, or description in writing had been furnished to the registrar under The Copyright of Designs Acts." Held, that it was a sufficient registration of a design applicable to the ornamenting woven fabrics comprised in class 12 of stat. 5 & 6 Vict. c. 100, to leave with the registrar a pattern or portion of the article of manufacture.

2. The plaintiff claimed as his design the particular collocation of the shaded and bordered stars upon an ornamented chain surface as shown in the registered pattern, thus forming together the ornamentation of the woven fabric: the stars and surface were old, but the combination was new: Held a new design, capable of being registered.

THE declaration stated that the plaintiff was, within the true meaning of stat. 5 & 6 Vict. c. 100, the proprietor of a new and original design applicable to the ornamenting woven fabrics comprised in class 12 mentioned in the statute, and which design was a design which had not, previous to the registration thereof, been published within the United Kingdom of Great Britain and Ireland or elsewhere; and the plaintiff so being such proprietor caused the design to be, and the same was, registered in respect of the application of such design to ornamenting articles of manufacture, that is to say, woven fabrics comprised in class 12, mentioned in the statute, by specifying the number of the class in respect of which such registration was made, and also caused his name to be and his name was then duly registered according to the statute as proprietor of the design. Averment. That after and ever since the publication of the design every *article of manufacture which [*496 had been made by the plaintiff according to the design, and every article of manufacture and substance on or to which the design had been used or applied by the plaintiff, had thereon the letters "R^d," and also numbers and letters in a form corresponding with the date of the regis-

tration of the design, and according to the provisions of the statute. And all conditions, matters, and things had been performed and had happened and existed which were necessary to entitle the plaintiff to, and the plaintiff was entitled to the benefit of the statute with regard to the design in respect of the application thereof to ornamenting woven fabrics comprised in class 12 within the United Kingdom for the term of twelve months, to be computed from the 15th February, 1861, the date on which the design was registered according to the provisions of the statute; and all conditions, matters and things had been performed, and had happened and existed, which were necessary to entitle the plaintiff to sue the defendant in this action. Yet the defendants on each of divers several occasions wrongfully and injuriously, and without the leave or consent in writing of the plaintiff as such registered proprietor, applied the designs and divers fraudulent imitations thereof respectively for the purpose of sale to and to the ornamenting of each of divers pieces of woven fabric then being articles of manufacture comprised in class 12, to which respectively the plaintiff had such sole right of applying the design, and also made and caused to be made divers of such pieces of woven fabric and articles according to the design, in breach of and against the sole right of the plaintiff, and contrary to the form of the statute, &c. Claim, 100l.

*497] *Pleas.—First, not guilty. Second, that the plaintiff was not the proprietor of the design. Third, that the plaintiff did not cause the design to be nor was the same duly registered. Fourth, that at the time of the alleged registration the design was not such new and original design not previously published within the United Kingdom of Great Britain and Ireland or elsewhere.

Issues thereon.

In pursuance of a Judge's order the plaintiff delivered the following particular specifying what he claimed as a novelty in the design registered by him; viz., "The particular collocation of the shaded and bordered stars upon the ornamented chain surface as shown in the registered pattern, thus forming together the ornamentation of the woven fabric."

On the trial, before Cockburn, C. J., at the Sittings at Guildhall after Hilary Term, it appeared that the plaintiff, in February, 1861, deposited with the registrar of designs for the purpose of registration a piece of cloth, which he called "Pekin cloth," showing on both sides a figured chain work ground called the Albert chain pattern and a six pointed star, as the design, which he claimed to be new and original; but no writing or description was left with it. The piece of cloth was accordingly registered. It was admitted that the ground was old. It was objected for the defendant that the registration was insufficient, as it did not enable the defendants to ascertain what part of the ornamentation of the piece of cloth the plaintiff claimed as his new and original design, or what in point of fact was the design of the fabric. The Lord Chief Justice left it to the jury to say what was the design which the plaintiff had registered; whether the star was new; and, assuming that *498] *the star as well as the ground was old, whether the combination of the star and the ground was new, and directed them that, if they thought the collocation was new and that the plaintiff had registered it, he was entitled to their verdict. The jury found that the design was a combination, consisting of an ornamental ground with stars of peculiar

shape collocated in a series of peculiar groups; and that such combination was new, although neither the ground nor the stars were new when taken alone. They found that there had been an infringement, and gave a verdict for the plaintiff, damages 40s., leave being reserved to move to enter the verdict for the defendant.

In Easter Term, *Manisty* obtained a rule nisi accordingly, on the ground that the registration was bad in point of law: because it could not be collected with reasonable certainty from the article of manufacture which the plaintiff furnished to the registrar, what the design was which the plaintiff intended to register as applicable to it; and because the registration enabled the plaintiff at his option to claim one or other of several designs, and not one design only applicable to woven fabrics comprised in class 12 mentioned in stat. 5 & 6 Vict. c. 100, s. 3.

Lush, Gray and Philbrick showed cause.—The design in question is applied to ornamenting an article of manufacture contained in class 12 of sect. 3 of stat. 5 & 6 Vict. c. 100, viz., “Woven fabrics, not comprised in any preceding class.” Sect. 4 requires registration before publication, and by sect. 15 the registrar is to be furnished with two copies, drawings, or prints of the design, and he is required to register them. Under this *section, if the design had been on paper, the plaintiff [*499 must have made two copies of it, and registered them; or if he had claimed the star only he must have made two drawings of it and registered them. Stat. 6 & 7 Vict. c. 65, s. 2, extended the protection of copyright to designs for the shape or configuration of articles of manufacture not of an ornamental character; and sect. 8 requires two drawings or prints of such designs to be registered. The Designs Act, 1850, 13 & 14 Vict. c. 104, s. 1, deals with both classes of designs, giving the registrar power to register them provisionally; and sect. 6 applies to the registration of sculpture, models, copies, or casts. The Copyright Designs Act, 1858, 21 & 22 Vict. c. 70, s. 5, declares “That the registration of any pattern or portion of an article of manufacture to which a design is applied, instead or in lieu of a copy, drawing, print, specification, or description in writing, shall be as valid and effectual to all intents and purposes as if such copy, drawing, print, specification, or description in writing had been furnished to the registrar under ‘The Copyright of Designs Act;’” which the preamble states to be the Acts mentioned in the Schedule, including 5 & 6 Vict. c. 100, 6 & 7 Vict. c. 65, and 13 & 14 Vict. c. 104. That section deals only with the registration of designs under stat. 5 & 6 Vict. c. 100, of which it amends sect. 4. A specimen being registered enables a person to judge what the design is better than a drawing or description of it. A new combination of old designs is a new design: *Norton v. Nicholls*, 1 E. & E. 761 (E. C. L. R. vol. 102); *Harrison v. Taylor*, in error, 4 H. & N. 815; and the plaintiff, by registering the whole, claims the whole, and not the parts. No action would lie against the defendant for taking the *star only and applying it to a new article of manufacture: if the plaintiff [*500 intends to claim the star he must register it separately. [CROMPTON, J.—Suppose the design consisted of stars and a beautiful border, my doubt is whether the plaintiff did not claim the parts as well as the combination.] The arrangement of the parts, not the individual parts separately, makes the pattern.

Manisty, Denman and Kemplay, contra.—The proprietor of a design

should furnish for registration an intelligible description of what the design is. [COCKBURN, C. J.—Suppose the plaintiff had registered a drawing of the design, showing the peculiar ground and stars.] That would be open to the same objection. Stat. 6 & 7 Vict. c. 65, s. 8, requires that the registrar shall be furnished with two drawings or prints of the design, with such description in writing as may be necessary to render the same intelligible according to his judgment. Stat. 13 & 14 Vict. c. 104, ss. 1, 6, require that the registrar shall be furnished with such copy, drawing, print, or description in writing or in print as in his judgment shall be sufficient to identify the particular design. [BLACKBURN, J.—Sect. 11 empowers the registrar to dispense with copies, drawings, or prints, and allows in lieu thereof such specification or description in writing or in print as may be sufficient to identify and render intelligible the design. And stat. 21 & 22 Vict. c. 70, s. 5, positively says that the registration of the article itself shall be as effectual as a copy, drawing, print, specification, or description in writing.] That statute, as appears from the preamble, was not passed with *501] reference only to stat. 5 & 6 Vict. c. 100, but for the *protection of copyright in designs under all the preceding Copyright of Designs Acts. This registration is bad for ambiguity in leaving it uncertain whether the star is not registered. In *Norton v. Nicholls*, 1 E. & E. 761 (E. C. L. R. vol. 102), it was held that leaving a shawl to be registered was not sufficient, and that there ought to have been a description in writing. [COCKBURN, C. J.—In that case there was a variety of designs in the shawl. CROMPTON, J.—If there could have been a perfect description of the shawl in writing the Court would have said that it was sufficient to leave the article of manufacture to be registered.] *Harrison v. Taylor*, in error, 4 H. & N. 815, is not in point.

COCKBURN, C. J.—This rule must be discharged. The plaintiff, availing himself of the provisions of the 5th section of stat. 21 & 22 Vict. c. 70, instead of registering his design in the shape of a drawing, &c., either with or without explanation in writing, registered a piece of the woven fabric to which that design had been applied, as an indication of what his design is.

The first question has been solved by the jury, viz., on the production of the woven fabric itself what is the design which appears upon it? They have found that the design is a combination of a particular groundwork with an ornament superinduced on it. The groundwork is well known as the Albert chain pattern; and the ornament superinduced is a star. The combination, which is what the fabric itself, when submitted to the eye of a competent judge, shows to be the design, is new; and *502] therefore, if the plaintiff has registered it in a manner *sufficient in point of law, he is entitled to the protection afforded by the statute.

It is said, in the second place, that, as matter of law, the registration is not sufficient, because it is ambiguous on the face of the pattern what is the design intended to be registered: that, inasmuch as the design consists of two parts, it is ambiguous whether the plaintiff intended to register as his design the combination, or either or both parts of it. But the difficulty vanishes when we consider that the statute only permits the registration of one design. A design may consist of one

single ornament, or of a combination of various elements. If the design shows on the face of it more elements than one in a state of combination, the reason of the thing requires that we should come to the conclusion that the combination was intended to be registered. And as soon as this is determined to be the law, all men will know that if the design consists of a combination of various elements, *e. g.* a pattern with different flowers, and they register the combination intending to secure the exclusive right to the elements of the design, they will defeat their object; for, if they intend to claim different parts which enter into the combination, as a flower on a particular ground, or by itself, they must register it separately. In the present case, the jury having found that this was a design comprising different things which formed one combination, and that the combination was new, the objection on the ground of ambiguity fails, and the plaintiff is entitled to our judgment.

CROMPTON, J.—I am of opinion that sect. 5 of stat. 21 & 22 Vict. c. 70, applies to the present case, and that there has been a good registration under it. In *Norton v. Nicholls*, 1 E. & E. 761 (E. C. L. [*508 R. vol. 102), Lord Campbell said, p. 765, that “the result of the combination, to be protected as a ‘design,’ must be one design, and not a multiplicity of designs.” Here the jury have found that there is a combination of things which is one design; and it was proper that it should be left to them to say what that design was. They have also found that it is new, and that there has been an infringement. The plea of non-registration opens the door to vexatious subtleties from the want of sufficient registration in analogy to those from the want of a good specification. It is much more convenient to have the article itself or an exact copy registered than a specification or description, to which quibbling objections may be raised on the ground that the description has not been rightly registered. I think the Legislature did not intend that the portion of the public who are interested should know more than is exhibited by the pattern,—if it shows what the design is that is sufficient. It is still left open to the Judge and jury to determine the merits, *viz.*, whether the invention is new or old, whether it consists of particular parts or of a combination, and whether it has been infringed. Sect. 5 says that wherever a copy, drawing, print, specification or description in writing would have been good, which I suppose will take in every case, the registration of a pattern or portion of the article to which a design is applied shall be valid and effectual to all intents and purposes: this must mean that it shall be valid and effectual as pointing out all that is necessary for the public to know. And if a pattern is valid for that purpose, and it is left with the registrar, the objection of non-registration cannot arise. The questions which might be made if a carpet *or shawl in which there were five or six distinct patterns [*504 were registered,—whether those are different designs, and in order to be protected must be registered separately,—do not arise here.

BLACKBURN, J.—The Legislature have given a qualified monopoly to persons who invent designs for ornamenting articles of manufacture. Such a design, which is not like an invention in manufacturing an article for which a patent is obtained, must be protected by registration. The original Act, 5 & 6 Vict. c. 100, s. 15, required that a drawing should be furnished to the registrar at the time of registration; but in passing

the new Act, 21 & 22 Vict. c. 70, s. 5, the Legislature thought it more convenient that the article itself should be substituted. [His Lordship read the section.] They have in plain words said that the deposit of the pattern or article to which the description is applied shall be as valid as the best description in writing, or as the best drawing of it, could have been. That being so, the registration in the present case was sufficient.

In all cases where the article itself is registered, the question must arise, what is the design? More or less of what is there seen may be the design, and that is a question of fact to be asked of the jury. It may be difficult to say what degree of evidence is necessary; but it must be a question for the jury, applying their eyes to the article before them. That question was asked in the present case, and I agree with the Lord Chief Justice and my brother Crompton that, as a general rule, a design for ornamenting an article of manufacture is an entire thing, and that part of that design would be a different design. There may *505] be part of a *design for one corner of an article and part for another, and then they should be registered separately. But here is one ornamental combination which is the whole design. The question whether it is an original design must depend on whether the design, as an entire design, was original; and the question of infringement must depend on whether the defendant made a colourable imitation of it. Those questions were asked and answered satisfactorily by the jury, and therefore there is no reason for disturbing the verdict.

Rule discharged.(a)

(a) See stat. 24 & 25 Vict. c. 73.

STALEY and Another, Appellants, The Overseers of the Township of CASTLETON, Respondents. June 8.

Poor-rate.—6 & 7 W. 4, c. 96, s. 1.—Cotton-mill not worked.

A cotton-mill, owing to depression in the cotton trade, was no longer worked, but was maintained at some expense as a factory, with its machinery in a fit state for working when the trade should revive. Held, that the occupiers were rateable for the mill, and that the rate should be made upon its annual value as a storehouse for the machinery in it, and not upon an estimate of the rent which might fairly be expected for it, if let for a reasonable term of years, with the prospect of improvement in value.

A RATE was made, on the 30th September, 1863, for the relief of the poor of the township of Castleton, in the parish of Rochdale, in the county of Lancaster, and was duly allowed and published. In the rate the appellants were assessed as occupiers of a "mill, &c." After notice of appeal against the rate had been given, the following special case was stated by order of a Judge.

The "mill, &c." mentioned in the assessment was, at the time of *506] making the rate, a cotton mill and premises *connected therewith, situate at Dicken Green, in the township of Castleton. The appellants were the owners, and so far as after stated the occupiers of the mill. The mill was furnished with a steam-engine of about forty (nominal) horse power, with a suitable steam boiler for generating steam to work the engine and to warm the mill. The mill was fitted to its full capacity with all the machinery useful and necessary for the purposes of

a cotton mill. Shafting connected with the steam-engine was fixed throughout the mill for the purpose of turning the machinery; and steam-pipes from the boilers were carried through all the rooms of the mill for the purpose of warming them.

Before and up to the time of the mill being stopped as after mentioned, the machinery in it was used by the appellants for spinning cotton: such machinery was in some instances fixed to the floor of the mill in order to its steadier working, while in other instances it was merely placed upon the floor. According to the custom of the trade, the machinery was in the nature of tenant's machinery or fixtures.

Shortly after the commencement of the present civil war in America, the business of the appellants as of other mill-owners in the same district fell off very much, and the appellants were compelled to reduce the hours of labour, and at length in January, 1862, in consequence of the continuing badness of trade, they determined to work up all the cotton they had in the machinery and on hand at their works, and to close the mill and discontinue business therein until a great improvement in the trade should take place. Accordingly, in January, 1862, the appellants finished the working of the cotton in the machinery and on hand at their *works, and discharged all their workpeople excepting their [*507 foreman or steam engineer, whom, and whom alone, they had since employed on the premises, at a considerable reduction in his wages, for the purpose only of keeping the steam in the mill, and turning the engine and machinery for the purpose and in manner after mentioned: and since that time they have not had any goods whatever in the mill, nor did they ever work the same in any way excepting for the purpose of turning the machinery, and keeping the mill and machinery in repair and ready for use upon the revival of the cotton trade. Ever since January, 1862, the rooms of the mill were kept constantly warmed by means of steam passed from the boiler through the steam-pipes: steam was constantly kept up in the boiler, which from time to time was cleaned for the purpose of keeping the same in condition: the steam-engine was worked at least one hour every day except Sunday: and the shafting throughout the mill was turned daily by the steam-engine. Every part of the machinery had remained in its proper place, and was cleaned from time to time as it required; those parts of the machinery known as the carding-engines, twenty-four in number, were occasionally turned by means of the steam-engine; and in short, since January, 1862, all parts of the mill and machinery were kept in a perfectly fit condition to be used as soon as a revival of the cotton trade should take place. For the purpose of keeping them so in order, the appellants were compelled to continue the services of their foreman or steam engineer, but all this was done for the purpose only of keeping the engines and machinery in condition, as they would otherwise have *been much depreciated, and would in time have become almost [*508 worthless as working machinery.

The gross and rateable values and the amount of rate of the "mill, &c.," as they appeared in the assessment, were made upon the three items and in manner following:—

	Gross Estimated Rental.	Rateable value.	Rate at 2s. in the pound.
Steam-engine 40 horse power at £2 per horse power	£ s. d. 80 0 0	£ s. d. 64 0 0	£ s. d. 6 8 0
Building of the mill	176 17 6	141 10 0	14 3 0
Office	5 12 6	4 10 0	0 9 0

The assessment was in fact made upon the engines and mill, as if they were in full work and operation as a cotton-spinning mill.

The office is a detached building standing separate from the mill and having distinct entrances, and the appellants admitted their liability to be rated for it.

It was admitted by the appellants for the purposes of the case, that prior and up to the commencement of the present civil war in America, the average rateable value of the "mill, &c.," as mentioned in the assessment, was 210*l.*, composed of the three distinct items of steam-engine, building of the mill, and office, and that such average rateable value will be at least as great when the cotton trade revives. Up to the commencement of the war the "mill, &c.," was yielding profits to the appellants, and upon the revival of trade it will probably yield them profits again.

*509] The questions for the opinion of the Court were: First, *whether the appellants were rateable at all to the rate for anything but the office, and if so for what; secondly, if the appellants were rateable for the mill and engine, or either of them, were they rateable as if the same were in full work, or were they rateable on the mill, as if it were a mere warehouse for storing machinery; or were they rateable for the mill and engine, or either of them, to the extent of the rent which might have reasonably been obtained for them if they had been let to a tenant from year to year, the tenant paying all the usual tenant's rates and taxes, and deducting therefrom the probable average amount of the cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent: or how otherwise.

The rateable value of the building of the mill used as a warehouse for storing machinery was for the purposes of the case agreed to be 141*l.*

Joseph Kay appeared for the respondents. The Court called upon *Holl*, for the appellants.—First. The mill has no rateable value; it has not been worked since January, 1862, and is an actual loss to the owners. Therefore no rent could be reasonably expected to be got for it. In 1 *Nolan Poor Laws*, p. 182, 4th ed., it is said, "To constitute a rateable occupier, it is necessary not only that there should be an occupation in fact, but that it should yield some return in the parish for which the rate is made, the assessment being made on the profits of the sub-

ject assessed;" and prospective profits cannot be taken into *ac- [*510
count. In *Rex v. The Inhabitants of Bedworth*, 8 East 387, where a coal-mine becoming unproductive ceased to be worked by the lessee, Lord Ellenborough said, p. 389, "With respect to the parish, he is only rateable for the concurrent annual value during the period for which the rate is made; and when the thing which he occupies no longer affords any such concurrent value, the subject-matter of the rating is gone."

Secondly. The machinery does not give a rateable value to the mill. If the mill was worked it would be rated according to its actual value, as combined with the machinery attached to it, on the principle recognised in *Reg. v. Haslam*, 17 Q. B. 220; but that case is no authority for holding that machinery in a building gives an increased value to it on account of its capacity to hold the machinery. If the machinery, whether fixed to the freehold or not, increases the value of the building, it becomes part of the subject-matter rated, and cannot be treated as a thing warehoused in the building.

Joseph Kay, in reply.—First. Considering the uncertainty of the cotton trade the test is what a tenant would give for the mill if it was let for a reasonable term of years. This was the principle of rating under stat. 43 Eliz. c. 2, s. 1. And The Parochial Assessments Act, 6 & 7 W. 4, c. 96, s. 1, has not altered it; on the contrary, sect. 1 has a proviso, "That nothing herein contained shall be construed to alter or affect the principles or different relative liabilities (if any) according to which different kinds of hereditaments are now by law rateable." If this were not the test coal-mines and underwoods, *which some years pro- [*511
duce no profit, would not be rateable in those years: *Rex v. The Inhabitants of Mirfield*, 10 East 219. [SHEE, J.—In the case of saleable underwoods there is no uncertainty; you propose an estimate of rent for an uncertain term.] In *Rex v. The Hull Dock Company*, 5 M. & S. 394, a Company were held rateable in respect of tonnage duties, though the expenditure in repairs during the six months for which the rate was made exceeded the amount of the duties received. Lord Ellenborough said, pp. 400–1, "The question therefore is, whether a rate can be imposed in respect of property which is generally rateable, but the profits of which, owing to certain incidental and necessary expenses, have been for a time exhausted. As to which it is to be observed, that a rate is not always imposed on property in the particular year in which it makes a productive return, for if that were so, there could be no rate in respect of saleable underwoods and the like property, which are productive only after a series of years, except in those years in which the profits arose It appears to me that this rate is well imposed, and that the average profits of the Company are not liable to be charged in the partial expenditure of any particular period."

Secondly. The mill is rateable for the improved value from the machinery: *Reg. v. Haslam*, 17 Q. B. 220 (E. C. L. R. vol. 79), *Rex v. The Birmingham and Staffordshire Gas Light Company*, 6 A. & E. 634 (E. C. L. R. vol. 33), *Rex v. Hogg*, 1 T. R. 721. [He was then stopped.]

BLACKBURN, J.—The question involved in this case is *of [*512
importance to a large number of persons, but does not present any great difficulty. A cotton mill, the subject of the rate, had been,

while the cotton trade was in a flourishing condition, of considerable annual value to be worked as a cotton mill, and as such, being real property in respect of which the occupier was to be rated, it fetched a high rent, and the occupier was rated accordingly. Times having changed, the business fell off to such an extent that it became a loss to carry it on, and the mill is no longer worked as a cotton mill, and there are outgoings but no incomings in respect of it. It is maintained as a factory with the machinery in it in a fit state for working when more favourable times return. The question is how is it to be rated at the present time. The Parochial Assessments Act, 6 & 7 W. 4, c. 96, s. 1, lays down the rule that the rate is to be made "upon an estimate of the net annual value" of the property rated thereunto, "that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates, &c., and deducting therefrom the probable average cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent"; with a proviso upon which Mr. *Kay* much argued. With reference to this proviso, Lord Denman, delivering the judgment of the Court in *Reg. v. Capel*, 12 A. & E. 382, 411 (E. C. L. R. vol. 40), says that its language "is loose, to a degree which renders the discovery of a definite meaning in all its parts extremely difficult." But, whatever were "the different relative liabilities" of different kinds of property intended in that proviso, it is clear that they will not affect the rating of this cotton mill. Applying then the principle of stat. 6 & 7 W. 4, c. 96, what is the *rent at which this mill might reasonably be

*513] expected to let from year to year, after deducting the probable average annual cost of repairs, &c., necessary to maintain it in a state to command such rent? The facts are that under existing circumstances, the hypothetical tenant hiring it as a cotton mill would not give anything for it, because, working it as a cotton mill in the current year, he would be out of pocket. Mr. *Kay*, on the part of the respondents, wishes us to say that because it is probable that before long cotton mills will be in full work again, and a man taking one for a term of years might reasonably expect that he would make large profits out of it, the rate should be made on an estimate of the rent which he would give. But this construction cannot be maintained without altering the language of the Act of Parliament from "let from year to year" to "let for a reasonable term of years." The effect would be that if a person was driving a shaft with the expectation of meeting a valuable vein of minerals he would be rated for probable profits from the minerals before he reached them. The Legislature intended that the rate should be made upon an estimate of the rent which would be given for the property *rebus sic stantibus*. In the case of vacant ground near a large town, likely soon to become building land, the test of the amount of the rate is not the rent at which it would let for a term of years. That case was considered by the Court of Exchequer in *Attorney-General v. The Earl of Sefton*, 2 H. & C. 362, on The Succession Duty Act, 16 & 17 Vict. c. 51, where it was held that there was nothing on which the duty could attach in respect of land so situated, and that the basis of assessment was the annual value of the property in its present condition,

*514] *and as used for the purposes to which it was devoted at the time, and not that which it might have at some future time. The

higher value which it may some day attain would probably be taken into account in estimating the selling price, but cannot be regarded in estimating the rent on a letting from year to year. If there were a reasonable prospect that during the current year the hypothetical tenant would give a higher rent, the amount of that rise might be taken into account; but deferred and reversionary prospects cannot.

The view of the appellant's counsel, that the mill has no rateable value, I think is also wrong. An estimate is to be made of the rent which a tenant would give for the real property occupied. If any parts of the machinery are so affixed to the building as to become a part of it they are part of the soil as much as if they were built into it. If not, the fact of their being there, or of their capacity for being beneficially used, would affect the yearly value of the premises; for a tenant in estimating the rent which he would give would take those things into account. We must suppose that the hypothetical tenant possesses the means of making the machinery available. There are many persons to whom a certain description of premises would be worthless, while to others they would be exceedingly valuable. To an ordinary man the lease of a railway would be a dead loss, but the hypothetical tenant in such a case must be supposed to be in the position of a Company, having stock, carriages, engines, &c., to make his occupation beneficial. So here it must be estimated what this mill would let for to a man who has the capacity to make use of the machinery in it. As to the machinery which consists of chattels, the occupiers of the mill think it worth while to *employ the building for the purpose of keeping the ma- [*515
chinery there and to pay money to maintain it in working order ready to be used. Regarding the mill merely as a storehouse for valuable machinery which it is important to keep in a state fit for use, it is obviously property for which some persons would give a rent. I could not assess the amount which would be paid, and we are not asked to do so: the parties have agreed upon it.

SHEE, J., concurred.

Rate to be reduced accordingly.

The QUEEN v. The DARLINGTON Local Board of Health.

June 8.

Public Health Act, 1848, 11 & 12 Vict. c. 63.—Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 73.—Local Board.—Interference with watercourse.—Compensation.—Action.—Mandamus.—Damage.

By the Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 45, Local Boards of Health are authorized to make and maintain sewers, subject to the conditions in sect. 145 that they shall not use, injure, or interfere with any watercourse, stream, river, &c., in which the owner or occupier of any lands, mills, &c., was interested, without consent in writing first had and obtained. The Local Government Act, 1858, 21 & 22 Vict. c. 98, having by sect. 63 repealed sect. 145 of stat. 11 & 12 Vict. c. 63, by sect. 73 prohibits the Local Board from doing any act injuriously affecting any reservoir, river or stream, &c., or the supply, quality, or fall of water contained in any reservoir, river or stream, "in cases where any Company or individuals would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, river, stream, &c.," without their consent in writing. The Local Board of D. made certain sewers in execution of the powers of stats. 11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 98, and in doing so injuriously affected the stream S., without having obtained the consent of T., who was the occupier of a mill on the S., and entitled to the flow of the S. to his mill. T. obtained a mandamus to the Local Board for compensation, and made a claim: (1) For damage sustained in consequence of the Board

opening the main sewer so as to allow the water of the S. to flow through it for forty-six hours. (2) For the water drawn from the S. and wasted by the main sewer being close to the S. (3) For a drain or trap door being made out of the S., and water allowed to flow out of the S. into the trap door. (4) For the Board having drained off the surface and refuse water from the streets of D. which had always run into the S.: Held,

1. That sect. 73 of stat. 21 & 22 Vict. c. 98, was not confined to cases in which a Court of equity would grant an injunction against the Local Board, and that T. was in the position of a person who would, if the Act had not passed, have been entitled by law to prevent the injuriously affecting the S.

2. That the works of the Local Board were not authorized by sect. 73, and therefore the claim of T. was not the subject of compensation, but ground of action.

3. *Quære*, whether the acts of the Local Board produced any damage of which T. could complain?

MANDAMUS directed to the defendants, dated the 12th June, 1860, suggesting that the prosecutor had since the 13th May, 1858, occupied and used a water corn mill, called Blackwell Mill, worked by water from a stream called the Skerne, and demised to him for ten years from the day and year aforesaid, and that during his occupation and user the defendants in the exercise of the powers of The Public Health Act, 1848, by means of certain drains and sewers by them made and continued so as to prevent the quantity of water to the use of which the prosecutor was entitled for the working of his mill and necessary thereto from flowing to the mill, diverted the course and waters of the stream, and stopped the waters which ought to have flowed into the stream from flowing thereinto, and permanently diminished the quantity of water to the use of which the prosecutor was entitled for the working of the mill, and that thereby he had been hindered from working and using his mill, and that by means of the premises the prosecutor had sustained damage by reason of their exercise of the powers of the Act; commanded the defendants to make full compensation according to the Act to the prosecutor for the damage by him sustained by reason of the exercise by them of the powers of the Act.

Return.—That the defendants did not in the exercise of the powers of the Public Health Act, 1848, divert or stop the course of the stream, *517] or stop the *waters which ought to have flowed into it from flowing thereunto, or diminish the quantity of water to the use of which the prosecutor was entitled for the working of the mill; that the prosecutor had not sustained any damage by reason of the exercise by them of the powers of The Public Health Act, 1848; and that if the defendants had stopped or diverted any water which ought to have flowed into the stream, or diminished the quantity of water to the use of which the prosecutor was entitled for the working of his mill or prevented from flowing to the mill any water to the use of which he was entitled for the working of his mill, or necessary thereto, such stoppage, diversion, diminution and prevention were not in the exercise of the powers of the Act, or in or by the making or continuing by them of any drains or sewers; and that although such stoppage, diversion, diminution and prevention were things done in the intended exercise by them of the powers of the Act, and bonâ fide intended by them to be done under the provisions of that Act, the same were not in fact done by them in, nor were the same in, the exercise of any of the powers of the Act, but were inadvertently done in excess of the powers thereof, and were contrary thereto, whereby a cause of action accrued to the prosecutor; and that the cause of action, if any, so being for things intended to be done under

the provisions of the Act, accrued and was complete above six calendar months before the issuing of the writ, and the application of the prosecutor for the writ, and the complaint of the prosecutor in the writ mentioned, and not at any time within such calendar months.

Plea.—That the defendants did, in the exercise of the powers of the Public Health Act, 1848, by means of certain drains and sewers by them made and continued *so as to prevent the quantity of water [*518 to the use of which the prosecutor was entitled for the working of his mill and necessary thereto from flowing to the mill, divert the course and waters of the stream, and stop the waters which ought to have flowed into the stream from flowing thereunto, and permanently diminished the quantity of the water to the use of which he was entitled for the working of the mill, and that he had sustained damage by reason of the exercise by them of the powers of the Act.

Issue thereon.

On the trial, before Keating, J., at the Durham Spring Assizes, 1861, a verdict was entered for the Crown, subject to a special case to be stated by an arbitrator for the opinion of this Court, as to the rights and liabilities of the parties under the issues raised by the mandamus proceedings; and after judgment should have been given thereon the arbitrator was to assess all damages, if any, which, according to the judgment, should be payable by the defendants to the prosecutor, the right of the prosecutor to recover damages by action, and the amount of such damages being thereby also referred to the arbitrator, and no objection to be taken by the defendants on the ground that the action would be too late.

On the 17th March, 1860, the prosecutor gave notice that he claimed compensation under the following heads: first, for damages sustained in consequence of the defendants opening the main sewer down the Skerne on the 18th and 19th June, 1859, for forty-six hours; secondly, for the water drawn from the Skerne and wasted by the main sewer being so close to the river; thirdly, for a drain or trap-door being made out of the Skerne and water allowed to flow out of the Skerne into the trap-door; *fourthly, for the defendants having drained off the rain [*519 and refuse water from the streets of Darlington, which had always run into the Skerne; and for other damage by him sustained in the premises or otherwise.

The following case was stated.

By lease dated the 2d March, 1858, G. Stonehouse, being seised in his demesne as of fee of and in Blackwell Mill, demised the same for the term of ten years from the 13th May, 1858, to the prosecutor, who thereupon then entered upon and occupied the mill under the lease until some time after the month of March, 1861, and carried on therein the business of a miller. Blackwell Mill is situated on the right bank of the stream called the Skerne, and at a short distance below the town of Darlington, through which the Skerne flows. Long before any of the operations of the defendants the occupiers for the time being of Blackwell Mill, as the representatives of ordinary riparian proprietors, without any prescriptive right, enjoyed the benefit and advantage of the waters of the Skerne for the working of the mill, and the prosecutor, during the time he occupied the mill, was entitled, as the representative of such riparian proprietors, to the use of the waters of the Skerne for the working of the mill, subject to the ordinary rights of other riparian

proprietors and the exercise by the defendants of their statutory powers. The defendants were constituted the Local Board of Health at Darlington, according to The Public Health Act, 1848, by a provisional order of the General Board of Health, dated the 1st August, 1850, and confirmed by The Public Health Supplemental Act, 1850 (No. 3). In that year the defendants constructed a drain or sewer from a point above *520] Darlington, along the right *bank of the Skerne for some distance, then for some distance beneath the bed of the stream, and terminating in a cesspool close to the left bank of the Skerne, with trap-doors admitting the waters of the Skerne into that sewer or drain for the flushing thereof. This sewer or drain is hereinafter called the first sewer. The termination of the first sewer and the discharge or return to the Skerne of the water so admitted therein was higher up the Skerne than Blackwell Mill, and no perceptible diminution of the water flowing to the mill was occasioned while the first sewer terminated at that place. In the years 1858 and 1859 the defendants constructed a new drain or sewer in continuation of the first sewer from the place where it so terminated as aforesaid along the left bank of the Skerne to a new cesspool considerably lower down the stream than the old cesspool, and below the place where the waters of the Skerne enter the dam of the mill, and beyond the district of the Board of Health. This new drain or sewer is hereinafter called the second sewer. The water passing through the second sewer passes to the Skerne at a place so far down the stream as to be lost to the mill.

On Saturday, the 18th June, 1859, after the first and second sewers were connected, by the direction of the person whose business it was to flush the sewers for the Board of Health a hole was made into the first sewer for the purpose of letting the water of the Skerne into that sewer to flush it, and this hole continued open until some time on the 20th June, when, upon the complaint of the prosecutor it was filled up by the direction of the surveyor of the Board of Health. During the time the hole continued open a large portion of the Skerne passed through the *521] hole into the first sewer, and thence into the *second sewer, and was wholly lost to the prosecutor, and the working of his mill was thereby stopped. This was the first head of the prosecutor's claim.

During the construction of the second sewer a certain quantity of the water of the Skerne oozed into it by reason of that sewer being near to and below the bed of the stream, and certain underground springs also oozed into the second sewer, which would but for the making of that sewer have percolated into the Skerne; whereby such quantity of the water of the Skerne and the springs were lost to the prosecutor. But since the completion of the second sewer no portion of the Skerne or of the springs finds its way into the second sewer, either by percolation or otherwise. This was the second head of the prosecutor's claim.

Since the construction of the second sewer, any water which passes into the first sewer through the trap-doors is lost to the mill, but the trap-doors are usually kept closed, and no water passes into the sewer through the trap-doors except when they are opened for the purpose of flushing the sewers, which is done occasionally, when there is fresh water in the Skerne. This was the third head of the prosecutor's claim.

Before the sewers were constructed, the surface drainage water from

the town of Darlington, which had never found any natural definite channel, together with the house drainage water, was conducted by artificial drains into the Skerne. These drains were altered by the defendants, and made to carry their water into the first sewer. Since the completion of the second sewer this water is carried by it below the prosecutor's mill, and is thus wholly lost to the mill. This was the fourth head of the prosecutor's claim.

*The streets and houses of the town of Darlington are supplied with water from the River Tees by means of waterworks, and not from the Skerne. [*522]

The questions for the opinion of the Court were, First. Whether the prosecutor was entitled to compensation in respect of all or any of his four heads of claim. Secondly. Whether, if the Court should be of opinion that the prosecutor was entitled to compensation upon one or more of those heads, and upon such head or heads he should not be able to prove any substantial damage, he would be entitled to nominal damages.

T. Jones, Northern Circuit (*J. Henderson* with him), for the prosecutor.—The injuries complained of arise from acts of the defendants done within the scope of the large powers conferred on Local Boards by The Public Health Act, 1848, 11 & 12 Vict. c. 63, ss. 43, 44, 45, to make and maintain sewers. Those powers were limited by sect. 145, which prohibited the Local Board from using, injuring, or interfering with any watercourse, stream, river, &c., in which the owner or occupier of any lands, mills, &c., was interested, without consent in writing first had and obtained. Under that section the remedy would have been by action and not by mandamus for compensation. But sect. 68 of The Local Government Act, 1858, 21 & 22 Vict. c. 98, which repeals it, confines the prohibition to public works and such as are constructed under the powers of an Act of Parliament; and sect. 73 only prohibits the Board from interfering with any reservoir, river, or stream, &c., "in cases where any Company or individuals would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such *reservoir, river, stream, &c." The [*523] later statute makes a difference between public and private waters, and allows the Local Board to interfere with the rights of the proprietor of a private watercourse except in cases where the acts done are such that a Court of equity would grant an injunction. In *Adams on the Doctrine of Equity* 210, it is said "the remedy at law for nuisance is by indictment in respect of public nuisances, and by action in respect of private nuisances or of the private injuries resulting from public ones. . . . The remedies, however, at law can at the utmost only abate, or afford compensation for, an existing nuisance, but are ineffectual to restrain or prevent such as are threatened or in progress; and for this reason there is a jurisdiction in equity to enjoin, if the fact of nuisance be admitted or established at law, whenever the nature of the injury is such that it cannot be adequately compensated by damages, or will occasion a constantly recurring grievance." In *Drewry on Injunctions*, pp. 248, 249, *Earl of Ripon v. Hobart*, 3 My. & K. 169, is referred to as deciding that "equity will not interfere to prevent a contingent nuisance, that is, an act which may or may not be a nuisance, according to the mode in which it is done;" and the rule there laid

down by Lord Brougham, p. 179, is cited, "Where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the Court will refuse to interfere until the matter has been tried at law." The construction of sect. 73 is embarrassed by the reference to an action at law, and the distinction between applications for an injunction before and after the act done which injuriously affects the right. But a Court of *equity will not interfere unless the damage be of an irreparable *524] character. [He referred to *Beardmore v. Tredwell*, 3 Giff. 683.] The heads of claim describe matters for compensation: the first is for a direct diversion of the stream: the second is for a loss of water of the stream. The injury from the third is only nominal, and therefore the prosecutor may abandon it. [As to the fourth, he cited *Sutcliffe v. Booth*, 32 L. J. Q. B. 136, 9 Jur. N. S. 1037, whereupon BLACKBURN, J., observed that in that case a right in the stream might be acquired, though the watercourse was artificial.]

Rew (Davison with him), for the defendants.—Where the matters of complaint are such that if the statutes in question had not passed no action could have been maintained, or they are matters for which notwithstanding those Acts an action might be maintained, there is no ground for compensation. The prohibition in sect. 73 of stat. 21 & 22 Vict. c. 98, is not limited to cases in which an action might be maintained or an injunction would be granted; but applies where any Company or individual whose right the Local Board invade might say, "You shall not do that," or "If you do that I will bring an action." If there is actual damage, though temporary, the interest of the party is injuriously affected within that section.

The first and third heads of claim, and so much of the second as is founded on the water of the Skerne oozing into the sewer are occasioned by the defendants doing that which they are not authorized by the Acts of Parliament to do, and are therefore the subject of an action but not of *525] compensation. The remainder of *the second head, which is founded on underground springs oozing into the sewer, is a matter for which neither compensation nor damages are recoverable: The *New River Company*, appts., *Johnson*, respt., 2 E. & E. 435 (E. C. L. R. vol. 105), *Reg. v. The Metropolitan Board of Works*, 3 B. & S. 710 (E. C. L. R. vol. 113), *Chasemore v. Richards*, 7 H. L. C. 349. The fourth head being for the alteration or diversion of artificial drains or watercourses, over which the prosecutor had acquired no prescriptive rights, is not the subject of either compensation or action. [He was then stopped.]

T. Jones, in reply.—The sections intervening between ss. 68 & 73 of stat. 21 & 22 Vict. c. 98, show that sect. 73 was not intended to prohibit interference in private as sect. 68 has done in public waters. The construction contended for by the defendants amounts to this, that there is to be no more interference with rights in private than in public waters, so that sect. 145 of stat. 11 & 12 Vict. c. 63, would not be repealed. Also sect. 74 of stat. 21 & 22 Vict. c. 98, might be struck out of that Act. If the Board were liable to an action for the smallest variation in the supply of water or the smallest alteration in the quality of the water caused by their works, they could never exercise the powers given by the Act.

BLACKBURN, J.—I am of opinion that our judgment should be for the defendants on the questions asked by the arbitrator. The defendants, The Darlington Local Board of Health, have made certain sewers in execution of the powers of two Acts, The Public Health Act, 1848, *11 & 12 Vict. c. 63, and The Local Government Act, 1858, 21 [*526 & 22 Vict. c. 98, and in doing so have injuriously affected the water of a stream on which the prosecutor has a mill. As riparian proprietor he had a right to the flow of the water of the stream as heretofore to his mill, although not an ancient one; and that right has been more or less injured by the works of the defendants. The question is, whether the injuries thus inflicted are matters for which he is entitled to compensation—if they are, the mandamus to the defendants is right, but if they are actionable at common law the mandamus is wrong. The rule is well established, that for any act done which is injurious to property, but which an Act of Parliament has authorized to be done, though the consequence of the act is *damnum* to the owner, it ceases to be *injuria*; and the loss would fall upon him, as no damages could be recovered in an action. To prevent that injustice the Legislature have said that instead of the action the party affected shall have compensation in the manner provided by the Act. Where, however, the Act of Parliament does not authorize the wrong, and consequently the action is not taken away, the case is not one for compensation, but the remedy is by action. We have to determine whether various matters done by the defendants are authorized by the Legislature, so that an action in respect of them is taken away.

The clauses in stat. 11 & 12 Vict. c. 63 which are repealed need not be inquired into, except so far as they are material to explain the repealing statute. The 68th sect. of stat. 21 & 22 Vict. c. 98 repeals sect. 145 of stat. 11 & 12 Vict. c. 63, and substitutes a restriction relating entirely to works of a public *nature. It is followed by sect. 73, relating [*527 to the water rights of Companies and individuals, which says that the Local Board shall not have authority to do any act injuriously affecting any reservoir, river, stream, &c., “in cases where any Company or individuals would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, river, stream, &c.,” without their consent in writing. The true meaning of these words is to define the position of the Company or individual whose consent in writing is required, and that consent is made a condition precedent. If not obtained the Board have no authority at law to do the act, and therefore an action would lie for injury sustained in consequence of it. In the present case the prosecutor as riparian proprietor is entitled to the flow of the water of the stream to his mill as heretofore; and if any unauthorized person interferes with, diverts, or diminishes it, he has a right of action at law, and is also entitled to ask a Court of equity for an injunction to prevent the doing of acts which interfere with his legal rights, or for an abatement of the thing done, when that is the appropriate remedy. A Court of equity indeed will not interfere in every case of an infringement of a legal right, when it appears that such interference is uncalled for or would not be judicious; but still the legal right remains. I cannot agree with the argument of Mr. Jones that the effect of sect. 73 is that the Local Board is or is not authorized to interfere with the rights of

persons situated as the prosecutor is according as a Court shall think the matter of sufficient importance to interfere or not. Even if a Court of equity would not interfere, it is still a question whether *the
*528] Local Board had a right to do the act and so put the party to his claim for compensation, or whether an action would lie.

I agree that it is difficult to understand section 73, as well as many others in the Act; but in order to make it intelligible we must look at sect. 68. By that section the Local Board are prohibited from interfering with any river, &c., which any corporation, &c., are entitled by virtue of any Act of Parliament to navigate, "so as to injuriously affect the navigation thereon, or the use thereof, or to interfere with any towing path so as to interrupt the traffic thereof;" and then by sect. 69, "In cases where any matters or things proposed to be done by any Local Board, and which are not within the prohibition aforesaid," that is, which do not injuriously affect the navigation or interrupt the traffic, "interfere with the improvement of any river, &c.," the Local Board shall give notice to the corporation, &c., and if they do not consent to the requisitions thereof the matter in difference shall be referred to arbitration; and the following questions shall be decided by such arbitration: "(1). Whether the matters or things so proposed to be done by the Local Board will cause any injury to such river, &c., or to the enjoyment or improvement of such river, &c. (2). Whether any injury that may be caused by such matters or things, or any of them, is or not of a nature to admit of being fully compensated by money." That appears to be what is to be done before the Local Board begin their works. And, by sect. 70, if the arbitrators are of opinion that no injury will be caused, the Board may proceed with the works; if they are of opinion that injury will be caused, but that it is of such a nature to *admit of
*529] being fully compensated by money, they may assess such compensation, &c.; if they are of opinion that injury will be caused, and that it is not of a nature to admit of its being fully compensated by money, the Board shall not proceed to do the proposed matter or thing. This applies to what the Local Board intend to do. Then sect. 74, which applies to what has already happened, enacts that any difference of opinion between a Local Board and other parties as to whether sewers, &c., constructed by the Board are equally effectual with those for which they are substituted, or whether the supply of water is injuriously affected by the exercise of powers under the Act, may at the option of the party complaining be determined by arbitration in the manner pointed out in the 70th section. So that whether damage has been already done or not, if there is a dispute whether a party is to be compensated or not, the arbitrators are to form their opinion whether injury will be caused, which provision when applied to what has been already done is not intelligible. But sect. 74 is a strong confirmation of the view that, if a Local Board injuriously affect a watercourse without obtaining the required consent in writing, and the party complaining does not choose to have the dispute determined by arbitration, the act is wholly unauthorized and illegal, and therefore ground of action, and not matter for compensation.

The prosecutor has ranged his claim for compensation under four heads. As to the first, if the act complained of affected any right, it was an injurious affecting of his stream, and therefore prohibited by

sect. 73 of the later Act. As to the second; I doubted for some time whether it was not a ground of compensation, but Mr. **Rew* [*530] satisfied me that as to part it was occasioned by an act of the defendants not authorized by the Acts, and as to the residue it was neither matter for compensation nor for damages. The third and fourth heads are within the same class as the first. It seems to me doubtful whether any of the acts complained of produced any real damage of which the prosecutor can complain; but, assuming that they did, they must be considered as acts which injuriously affect his rights, and therefore are not the subject of compensation, but of an action for damages.

SHER, J.—By sect. 45 of stat. 11 & 12 Vict. c. 63, Local Boards are authorized to construct sewers under the conditions mentioned in sect. 145, one of which is that they shall not “use, injure or interfere with” certain works therein mentioned, or “any watercourse, stream, river, &c., in which the owner or occupier of any lands, mills, &c., shall or may be interested, without consent in writing first had and obtained.” It appears from the enactments of the subsequent Act, 21 & 22 Vict. c. 98, that these restrictions were considered too large; and accordingly sect. 68 of that Act repeals sect. 145 of the former Act, and substitutes various provisions relating to the interference by Local Boards with sewers and public and other works under the management of Commissioners and persons acting by virtue of some Act of Parliament, which amount to a prohibition unless consent in writing is obtained. Provision is next made, by sect. 69, in respect of interference with improvements of rivers, canals, &c., under the management of any corporations, &c.: in these cases interference is not positively prohibited; and, by sect. 72, power is given to the corporations, &c., to alter the level **of the* [*531] sewers constructed by the Local Board. Then follows sect. 73, which does not apply to all the matters which are the subject of sect. 145 of stat. 11 & 12 Vict. c. 63, but to a portion of them only, excluding canals, docks and basins. It provides for rivers, streams and reservoirs, and instead of enacting that the Local Board shall not use, injure or interfere with them, enacts that it shall not have authority to do any act injuriously affecting them, “in cases where any Company or individuals would, if this Act had not passed, have been entitled by law to prevent or to be relieved against the injuriously affecting such reservoir, river, stream, &c.,” unless consent has been obtained. I understand these words to mean that they shall not only not use or interfere with them, either by going on land or by fouling or diminishing the power of the stream, but shall not injuriously affect them, which phrase is considerably larger, in any case where the party would be entitled by law to prevent, or by a Court of equity to prohibit, them from interfering with his property in any way which would affect it, as in the present instance by diverting the supply of water. Sect. 74 of the later Act extends the provisions of sects. 69, 70, for settling questions by arbitration in the case of matters or things proposed to be done by the Local Board, to cases in which there has an injurious affecting by the exercise of the powers of the Act, but what is to be done may be assented to or not by the party affected. This section strongly supports the view that these are acts which the Local Board are not authorized to do; and the injury resulting from them is therefore ground for action and not for compensation.

*532] *BLACKBURN, J.—My brother Mellor, before he left the Court, authorized me to say that he perfectly concurred with the judgment which we have given.

Judgment for the defendants.

KNOWLDEN and Others v. The QUEEN. June 1.

Vexatious Indictments Act, 22 & 23 Vict. c. 17, s. 1.—Averment of conditions.—Recognisances.—Writ of error.

By stat. 22 & 23 Vict. c. 17, s. 1, no bill of indictment for conspiracy, among other offences, shall be presented to or found by any grand jury unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction or with the consent in writing of a Judge or of the Attorney or Solicitor General. Three defendants were severally bound by recognisance to appear at the next Session of the Central Criminal Court, and there surrender themselves, and plead to such indictment as might be found against them for or in respect of the charge of conspiracy to cheat and defraud. The prosecutors were also bound over to appear at such next Session, and to prefer or cause to be preferred a bill of indictment against the persons accused for the offence of conspiracy to cheat and defraud, and duly to prosecute such indictment and give evidence thereon. At the next Session an indictment was preferred and found, and the defendants surrendered; but in consequence of the absence of a material witness for the prosecution the trial was put off, and the recognisances duly respited until the next Session. Before the next Session the Solicitor-General directed an indictment for a conspiracy to be preferred against the three defendants and a fourth, C. D.; (a) and a second indictment was preferred and found against them all, upon which the original defendants appeared, but refused to plead. A plea of not guilty was entered for them, and they were tried and found guilty and sentenced. On a writ of error: Held,

1. That it was not necessary that the indictment should aver that the conditions imposed by stat. 22 & 23 Vict. c. 17, s. 1, had been performed, *e. g.*, that it had been preferred by the direction or with the consent of a Judge or of the Attorney or Solicitor General.

2. That the indictment was preferred with proper authority, and the recognisances duly entered into, as the charge on which the defendants were tried was the same as that to which the recognisances related; and those recognisances were not exhausted by the first indictment being preferred and the defendants surrendering.

WRIT of error upon a judgment on an indictment for conspiracy tried in the Central Criminal Court at the October Session in 1863.

*533] *The record set out the indictment which consisted of twenty-two counts.

The first count alleged that “a certain friendly Society, called The Perseverance Life Assurance and Sick Fund Friendly Society, had been and was formed and established, and that John Knowlden, Thomas Oxford, John Dron and Charles Alfred Coombs, heretofore, to wit, on, &c., at, &c., and within the jurisdiction of the Central Criminal Court, well knowing the premises, in this count aforesaid, unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to obtain and acquire to themselves of and from divers others of Her Majesty’s liege subjects who should become members of the said Society divers sums of money of the respective moneys of the said other liege subjects who should become members of the said Society, and to cheat and defraud them respectively thereof; against the peace of our lady the Queen, her crown and dignity.”

(a) The direction of the Solicitor-General was only given to prosecute the fourth defendant.

The record then stated that John Knowlden, Thomas Oxford and John Dron surrendered themselves to answer the premises, but Charles Alfred Coombs came not, and John Knowlden, Thomas Oxford and John Dron being brought to the bar, and having heard the indictment read, severally refused to plead thereto, whereupon a plea of not guilty was duly entered upon record for and on behalf of each of them, and the jury found them severally guilty; whereupon it was considered and adjudged by the Court that for the offence and misdemeanor in the first count of the indictment mentioned John Knowlden, Thomas Oxford and John Dron be severally ordered to be imprisoned and kept to hard labour for eighteen calendar months then next ensuing.

*The same judgment was given upon each of the other counts. [*534

In Hilary Term, 1864, John Knowlden, Thomas Oxford and John Dron assigned error.

First. That the indictment was not sufficient in law.

Secondly. That whereas by an Act passed in the 22 & 23 Vict. it is enacted that no indictment for the offences therein set forth, whereof one is the misdemeanor of conspiracy, shall be presented to or found by any grand jury unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offences, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a Judge of one of the superior Courts, &c.; yet at the time of the presenting and finding of the indictment neither the prosecutors nor any other person presenting the indictment were or was bound by recognisance to prosecute or give evidence, but certain recognisances entered into by the prosecutors presenting the indictment against the plaintiffs in error had been discharged and fulfilled previously, to wit, on the presentation and finding of an indictment presented and found (so far as the same could be discharged and fulfilled by the presenting and finding of an indictment) at the Session of the Central Criminal Court holden on the 21st September, 1863, when the plaintiffs in error were charged with the offence of conspiracy jointly one with the others and other, not with *Charles Alfred Coombs, which indictment now [*535 remains in the Central Criminal Court and has never been quashed and is still pending, and the plaintiffs in error were not committed or detained in custody, nor were bound over by recognisances to appear to answer the indictment presented and found on the 26th October, 1863, nor was the indictment which was presented and found for the offence of conspiracy charged to be committed in England by the plaintiffs in error and Charles Alfred Coombs preferred or found with the consent or by the direction of a Judge of a superior Court nor of the Attorney or Solicitor General, nor were the provisions of the statute in any way complied with.

Thirdly. That whereas by the said statute it is provided that no indictment for the offence of conspiracy shall be presented or found by any grand jury unless the person accused has been bound by recognisance to appear to answer to an indictment to be preferred against him

for such offence, yet the plaintiffs in error were not nor were any of them bound by recognisance to appear to answer to the indictment preferred on the 26th. October at the Central Criminal Court, wherein the plaintiffs were charged together with Charles Alfred Coombs with the offence of conspiracy ; but that the plaintiffs in error were bound by recognisance before one of the magistrates of the Police Courts of the Metropolis to appear to an indictment charging the plaintiffs in error with the offence of conspiracy one with the others and not with Charles Alfred Coombs, which offence is not the offence wherewith the plaintiffs were charged before the magistrate and bound over by recognisance to appear to answer to, but other and different, &c.

*536] Fourthly. That on the 24th October, 1863, the *Solicitor-General signed a written direction to the effect following, to wit :—

“ Central Criminal Court. October Session, 1863.

“ The Queen v. John Knowlden, Thomas Oxford, John Dron and Charles Alfred Coombs.

“ I direct an indictment to be preferred against the above-named Charles Alfred Coombs at the Central Criminal Court for a conspiracy to defraud.”

(Signed)

“ R. P. COLLIER,
“ Solicitor-General.

“ Dated the 24th day of October, 1863.”

And that thereupon the indictment against the plaintiffs in error and Charles Alfred Coombs was presented and found by the grand jury at the October Session of the Central Criminal Court, under which indictment the plaintiffs in error are now convicted, and that there was no sufficient allowance and authorization of the indictment by consent in writing of the Solicitor-General as required by the statute, nor have the requirements of the Act been complied with in the presenting and finding of the indictment.

Fifthly. That it did not appear upon the record and proceedings that the indictment was authorized and allowed as is provided by the statute by the consent in writing of a Judge or of the Attorney or Solicitor General, so as to be lawfully presented and found by the grand jury at the said Session.

The sixth assignment set out the recognisances by which, on the 19th August, 1863, the plaintiffs in error were respectively bound to appear. That by which John Knowlden was bound was in the following form :—

“ Metropolitan Police Dis-) Be it remembered, &c. Whereas the said
*537] trict, to wit.) John Knowlden (with *others) was this day

charged before me, the said magistrate, for that they did unlawfully conspire, confederate and agree together to cheat and defraud against the peace, &c. If therefore, the said John Knowlden will appear at the next Court of oyer and terminer and gaol delivery, to be holden for the jurisdiction of the Central Criminal Court, and there surrender himself into the custody of the keeper of the gaol of Newgate there, and plead to such indictment as may be found against him by the grand jury for or in respect of the charge aforesaid, and take his trial upon the same, and not depart the Court without leave, then the said recognisance to be void, or else to stand in full force and virtue. Taken, &c. T. B. BURCHAM.”

The seventh assignment set out the recognisance by which the prosecutors and witnesses were bound to prosecute. The condition was: "Whereas John Knowlden, Thomas Oxford and John Dron were this day charged before me, the said magistrate, for that they, in the county of Surrey aforesaid, within the district and within the jurisdiction of the Central Criminal Court, did unlawfully conspire, confederate and agree together to cheat and defraud, against the peace, &c. If therefore, they the said parties so acknowledging as aforesaid shall appear at the next Court of oyer and terminer and gaol delivery to be holden for the jurisdiction of the said Central Criminal Court, at Justice Hall, in the Old Bailey, and there prefer or cause to be preferred a bill of indictment against the said John Knowlden, Thomas Oxford and John Dron for the offence aforesaid, and duly prosecute such indictment and give evidence thereon, as well to the jurors who shall then inquire of the said offence, as also to them who shall pass upon the *trial [*538 of the said John Knowlden, Thomas Oxford and John Dron, then the said recognisance to be void or else to stand in full force and virtue. Taken, &c. T. B. BURCHAM." The assignment of error then proceeded to state that, in pursuance of and compliance with the last recited recognisance, at a Session of the Central Criminal Court holden on the 21st September, 1863, a certain bill of indictment was preferred and found by the grand jury sitting for the jurisdiction of the Central Criminal Court; [the indictment was set out]; that the counsel for the prosecutors applied to the Court to postpone the trial of the indictment, upon an affidavit alleging the absence of a material witness; that the plaintiffs in error appeared by counsel and opposed the application, which was however granted by the Court, and the trial of the indictment ordered to be postponed until the next Session of the Central Criminal Court; that on the 24th October, 1863, the Solicitor-General gave the direction in writing before set forth; that an indictment was presented and found on the 26th October, 1863, and on the 27th and 28th October the plaintiffs in error were tried and convicted on that indictment, and except so far as hereinbefore mentioned none of the provisions of the recited statute were complied with, and there was no recognisance or commitment or detainer in custody to authorize the indictment to be presented or found, nor was the indictment prepared by the direction or with the consent in writing of a Judge of one of the superior Courts or of the Attorney-General or Solicitor-General.

Joinder in error by Thomas Norton, Esq., coroner and attorney of our lady the Queen, &c. That at the Session of the Central Criminal Court holden on the 21st September, *1863, it was ordered by [*539 the Court, upon the application of counsel for the prosecution, and on account of the absence, through illness, of a material witness, that the trial of the plaintiffs in error upon the indictment should be postponed until the next Session of gaol delivery to be holden for the jurisdiction of the said Court, to wit, until the Session of gaol delivery holden on the 26th October, 1863, and that the recognisances entered into for the prosecution, together with those entered into by the plaintiffs in error, with their sureties, should be respited until the said next Session; and that the recognisances entered into by the plaintiffs in error, with their respective sureties, were accordingly duly respited until the next Session, to wit, the said Session of gaol delivery holden

on the 26th October, A. D. 1863, and that at the last-mentioned Session of gaol delivery, the plaintiffs in error did, in pursuance of their several recognisances, surrender themselves to answer the premises as in the said record and proceedings is mentioned, and such further proceedings were thereupon had and taken as in the record and proceedings is mentioned and set forth, &c.

Stat. 22 & 23 Vict. c. 17, s. 1. "No bill of indictment for any of the offences following, viz., perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, &c., shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an *540] indictment to be preferred against him for such *offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a Judge of one of the superior Courts of law at Westminster, or of Her Majesty's Attorney-General or Solicitor-General for England," &c.

The argument was begun in Easter Term, May 4th, before COCKBURN, C. J., BLACKBURN, MELLOR and SHEE, JJ., and now resumed afresh before COCKBURN, C. J., CROMPTON, BLACKBURN and SHEE, JJ.

Giffard (*Besley* and *Kydd* with him), for the plaintiffs in error.—First. As to the error in law. The indictment is bad for not averring that before it was presented to or found by the grand jury the direction or consent of a Judge, or of the Attorney or Solicitor General, had been obtained, and the other conditions imposed by stat. 22 & 23 Vict. c. 17, s. 1, complied with. This point was not raised in *Reg. v. Heane*, 4 B. & S. 947 (E. C. L. R. vol. 116). All circumstances necessary to the jurisdiction of the Court must appear either in the caption or some other part of the indictment: *Rex v. Fearnley*, 1 Leach C. C. 425; *Rex v. Carter*, 1 Str. 442; *Whitehead v. The Queen*, 7 Q. B. 582 (E. C. L. R. vol. 53): as where the jurisdiction of the Court to try depends on the place where the offence was committed, or on the character filled by the accused. In indictments in the Central Criminal Court it is necessary to state that the offence was committed within its jurisdiction. [*Welsby*, for the prosecution.—Indictments which have been drawn for *541] the Government did not state it.] Before The *Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 225, an indictment against a bankrupt for any offence against the bankrupt laws must have stated all the ingredients which make up the bankruptcy. [COCKBURN, C. J.—Otherwise the offence charged would not appear to have been committed. BLACKBURN, J.—And a conclusion of law would be alleged.] Where a tribunal exercises special jurisdiction, the ground of its authority should be shown on the face of the proceedings: *Rex v. Forsyth*, 2 Leach C. C. 826; *Rex v. Fraser*, 1 Moo. C. C. 407; *Reg. v. Whiley*, 2 Id. 186; *Case of Æneas Macdonald*, Foster Crown Law 59. [COCKBURN, C. J.—The case of *Æneas Macdonald* was before a tribunal having special jurisdiction. The grand jury were sworn solely under that commission, and the caption would so state. MELLOR, J.—Here the direction of the Judge or of the Attorney or Solicitor General does not

give the grand jury jurisdiction.] In *Reg. v. Fuidge*, 1 Leigh & Cave C. C. 390, where the requirements of stat. 22 & 23 Vict. c. 17, had been complied with in respect of one only of two counts in an indictment for obtaining money by false pretences on two several occasions, and the prisoner having refused to plead, a verdict of not guilty was entered by direction of the Court, and the prisoner was convicted upon each, the Judges upon a case reserved held that the second count ought to have been quashed. In *Hollis v. Marshall*, 2 H. & N. 755, which was a *qui tam* action to recover a penalty from the defendant as a Commissioner under a local Act for acting as such without a qualification, contrary to sect. 15 of The Commissioners Clauses Act, 1847, 10 & 11 Vict. c. 16, which was incorporated in the local Act; that Act also *incorporated sect. 133 of The Public Health Act, 1848, 11 & 12 Vict. c. 63, which provides that no proceedings for the recovery [*542 of any penalty shall be had or taken by any person other than by a party grieved, or the Local Board of Health in whose district the offence was committed, and without the consent, in writing, of the Attorney-General first had and obtained; it was held that, the plaintiff not being a party grieved, the declaration was bad in arrest of judgment for not alleging that the consent of the Attorney or Solicitor General, &c., had been obtained. [BLACKBURN, J.—There the same Act which gave the action for the penalty also imposed a condition upon it. Where there is general jurisdiction to try, and a qualification is placed upon it by statute, the party who seeks to take advantage of the qualification or exception must show it: *Stowell v. Lord Zouche*, Plowd. 353, 376, per Dyer, C. J.] The protection intended to be given by stat. 22 & 23 Vict. c. 17, against vexatious indictments will be lost if it be not necessary to aver that the conditions have been fulfilled. Unless it be averred on the record that the direction or consent of a Judge or of the Attorney or Solicitor General has been given, the defendant would have no opportunity of inquiring into or litigating the fact, and the Judge at the trial would have no power to try it; and if it be falsely averred, the prosecutor or person promoting the indictment would be indictable for perjury. [BLACKBURN, J.—There is a practical inconvenience in producing the direction or consent of the Judge or of the Attorney or Solicitor General at the trial, as it would prejudice the case against the defendant. In the case of a criminal information filed with the clerk of the Crown Office the *leave of the Court which, by stat. 4 & 5 W. & M. c. 18, s. 2, must have been obtained, is never stated [*543 in the information. If it were stated, how could the Court of Error or the House of Lords try whether it had been given?] In that case the Court itself makes the order for filing the information. [CROMPTON, J.—But the Judge who tries the information does not see the order.] The enactment in stat. 4 & 5 W. & M. c. 18, s. 2, is only a direction to the officer of the Court. Stat. 22 & 23 Vict. c. 17, s. 1, enacts that no bill of indictment for any of the offences specified shall be presented to or found by the grand jury, unless certain conditions are fulfilled. [BLACKBURN, J.—The words of stat. 4 & 5 W. & M. c. 18, s. 2, are to the same effect,—the clerk of the Crown “shall not, without express order to be given by the said Court in open Court, exhibit, receive, or file any information for any of the causes aforesaid.” CROMPTON, J.—Does the clerk of indictments sign every bill which goes before the

grand jury?] On the Welsh circuit he does; but in the Central Criminal Court he does not, nor in Surrey; and the practice on other circuits varies. [BLACKBURN, J.—Every bill passes through his hands. CROMPTON, J.—Though it may be engrossed by a private prosecutor. He also has the committals by the magistrates; so that he has always the materials which would enable him to stop the bill going before the grand jury.] He cannot entertain or determine the question whether the conditions have been fulfilled; and he has no power to administer an oath. The only remedy for defendants will be to bring a writ of error on the chance that the conditions have not been complied with; whereas the object of the statute was to restrain vexatious indictments, and the accused is not informed of *that which alone justifies an indictment by which his liberty may be restrained.

Secondly. As to the errors in fact. First. There was no authority for preferring the first indictment. The direction of the Solicitor-General is an authority only for an indictment charging the three defendants with a conspiracy in which Coombs was a co-conspirator. Secondly. There were no recognisances relating to the indictment on which the three defendants were convicted. Those which were entered into related to an indictment against the three defendants only, and the persons being different the prosecution is different. Thirdly. Though the recognisances of the prosecutors were complied with in respect of preferring a bill, they were not in respect of giving evidence on the second indictment. The recognisances of the defendants were exhausted when they surrendered in September. Looking at the assignment of error and joinder, it is clear that the parties reacknowledged the recognisances and that they were not respited. [CROMPTON, J.—The defendants might remain in custody if they please. We must take it that the recognisances were respited by the Court without fresh recognisances being entered into.] Lastly. The recognisances of the prosecutors to prefer a bill were complied with by preferring a bill at the Session in September, and therefore were exhausted. The Court enlarged the recognisances, but without the consent of the defendants.

The Solicitor-General, for the prosecution.—First. As to the error in law. It is not necessary that the performance of the conditions prescribed in stat. 22 & 23 Vict. c. 17, s. 1, should be stated on the record. *545] The *provision in that statute is the same as that in stat. 4 & 5 W. & M. c. 18, and in informations under the latter the order of the Court has never been stated. In Paley on Convictions, 4th ed., p. 195, the rule is laid down thus, “Where the enacting clause of a statute constitutes an act to be an offence under certain circumstances and not under others, then as the act is an offence only *sub modo*, the particular exceptions must be expressly specified and negatived, but where a statute constitutes an act to be an offence generally, and in a subsequent clause makes a proviso or exception in favour of particular cases or in the same clause, but not in the enacting part of it, by words of reference or otherwise makes such proviso or exception, there the proviso is matter of defence or excuse, which need not be noticed in the information.” This rule distinguishes the cases cited on the other side from the present. Moreover, the objection is not ground of error. The proper course is to make it the ground of an application to quash the indictment or for a certiorari. A writ of error lies only where the

matter objected to appears on the record. [He referred to *Mansell v. The Queen*, 8 E. & B. 54 (E. C. L. R. vol. 92).]

Secondly. As to the errors in fact. The recognisances were respited in the usual and proper manner. [CROMPTON, J.—In *Reg. v. Lord Drummond*, 11 Mod. 200, the defendant stood bound by recognisance to appear here the first day of Hilary Term; and upon an application that his recognisance might be discharged on the ground that his non-appearance was excused by reason of sickness, the Attorney-General consenting *thereto, Lord Holt said, notwithstanding such consent the Court could not discharge the recognisance, but they [*546 could respite it until the next term, which was done accordingly. COCKBURN, C. J.—In *Burn Just. by Chitty*, “*Recognisance*,” vol. 5, p. 691–2, it is said, “The Court before which a man is bound by his recognisance to appear, may respite that recognisance until another time, upon his application, if, under the circumstances, they think it right to do so,” citing *Reg. v. Lord Drummond*. “And in that case he will be bound to appear at such enlarged time. But they will not discharge it, or allow it to be withdrawn, unless they are satisfied that the condition of it has been substantially complied with.”] The requirements of stat. 22 & 23 Vict. 17, s. 1, have been complied with: the prosecutors have been bound over to prosecute, and the witnesses have also been bound over to appear and give evidence: it is sufficient that the prosecutor has been once bound over so long as the offence charged is the same. Here the offence is the same, though Coombs has been included in the indictment in addition to the plaintiffs in error. An indictment for conspiracy, whether among three or four persons, is equally within the purview of the recognisances, the condition of which is to answer such indictment as may be found against these persons. On the trial of an indictment for conspiracy some defendants may be convicted and others acquitted: *O’Connell v. The Queen*, 11 Cl. & F. 155, 237. If they had been tried and acquitted upon the first indictment they might plead *autrefois acquit* to the second. In *Arch. *Crim. Plead.* 15th ed., by Welsby, [*547 p. 120, it is said, “The true test by which the question, whether [*547 such a plea is a sufficient bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.” The presenting of the bill on which the prosecutors did not proceed did not exhaust the recognisances: though a *nolle prosequi* be entered or an indictment be quashed, a second may be preferred, if in accordance with the terms of the recognisance.

Giffard, in reply.—In *Reg. v. Heane*, 4 B. & S. 947 (E. C. L. R. vol. 116), though the Court refused to quash the indictment, it was said that there would be a remedy for the defendant on a writ of error. [BLACKBURN, J.—We said that we would not quash the indictment because, it being discretionary with the Court, the doubt was whether the indictment, which was under stat. 24 & 25 Vict. c. 115, s. 97, was an indictment for perjury within the purview of stat. 22 & 23 Vict. c. 17.] Stat. 22 & 23 Vict. c. 17, is general, and deprives the grand jury of jurisdiction unless the conditions prescribed by it have been complied with. Also this indictment is not within the ambit of the recognisances, for the defendants, if tried on the first indictment, never would have been in peril on this charge. [COCKBURN, C. J.—Suppose a prosecutor

prefers two indictments instead of one: or suppose the first indictment quashed for informality, there is nothing to prevent the prosecutor preferring another. BLACKBURN, J.—Nor is it necessary to quash one indictment before another is preferred. Would the forfeiture of *548] *recognisances put an end to the right of the prosecutor to prefer another indictment? The argument would come to this, that if a prisoner was committed to custody and escaped there would be no power to proceed against him because he was not in custody.] It might not be competent to him to set up his wilful act. [BLACKBURN, J.—The words of stat. 22 & 23 Vict. c. 17, s. 1, are, “unless the person accused has been committed to or detained in custody.” You alter the past tense into the present, and make the condition to be “unless the person accused has been committed to or is detained in custody,” in order to produce an effect which the Legislature never intended. If the charge is got rid of by an acquittal, that is another matter.] The case of a prisoner escaping was probably not contemplated by the Legislature. [He referred to sect. 2 of stat. 22 & 23 Vict. c. 17.]

COCKBURN, C. J.—The judgment must be affirmed. The first and principal question is, whether the conditions required by stat. 22 & 23 Vict. c. 17, s. 1, as preliminaries to the presenting and finding indictments for the offences specified in that statute, must appear on the face of the record to have been complied with. I am of opinion that it is not necessary. The rule that every preliminary necessary to give jurisdiction must appear on the face of the record, is subject to the qualification pointed out by my brother Blackburn during the argument. Here the general jurisdiction of the grand jury to find a bill for the specified offences remaining as at common law, the statute only says, that before that jurisdiction is exercised certain conditions must be complied with: *549] as soon as that is done the grand *jury are seised of the subject-matter, and an indictment which sets forth the offence as at common law is sufficient. It would be very inconvenient that proof of the proper recognisances having been entered into, and of the consent of a Judge or of the Attorney or Solicitor General having been obtained, should be given before the petty jury; and if they were stated on the record they might be traversed and must be proved. That cannot have been the intention of the Legislature; though, before the grand jury find a true bill, there ought to be enough to satisfy them that the conditions required by the statute have been complied with, and practically this will be done by the clerk of indictments, who, before he lays the indictment before them, would require the direction of the Judge or the Attorney or Solicitor General to be produced. It does not appear to me that any practical inconvenience will result from holding this to be so; for the accused must know how the fact stands with regard to himself, whether he has been bound over to appear or not; and he must also be aware whether the prosecutor has been bound over to prosecute, for the binding over must have occurred in his presence. And if there is any doubt whether a direction has been obtained from a Judge, or from the Attorney or Solicitor General, the fact may be ascertained from the clerk of indictments. There can be no doubt that if a prosecution has been improperly instituted, and a deception has been practised on the officer of the Court or on the grand jury, redress could be obtained in some shape by the party improperly subjected to prosecu-

tion; whether it would be by appeal to the discretion of the Court, or by application to the Judge to quash the indictment, or, where knowledge of *the omission comes to the accused at a later stage, by [*550 writ of error alleging error in fact, it is not necessary to decide.

As to the minor points upon the assignment of errors in fact. First. It is said that this is not the same prosecution as that in which the recognisances were entered into, because the three plaintiffs in error were bound over to appear on a charge of conspiracy between themselves, whereas an indictment has been preferred against them for a conspiracy among four; but in substance it is the same, for the corpus delicti is the conspiracy, and the only variation in the second indictment is that a fourth person is charged to be one of the co-conspirators; and one or more of several co-conspirators may be convicted, though the others are acquitted. Therefore the recognisances apply to the second indictment, and the statute is satisfied.

It is said, further, that the recognisances were not in existence when the second indictment was preferred. As to this, first, it is questionable whether the recognisances were not still in existence, although the prosecutors did not appear and prosecute, nor the defendants appear and take their trial according to the exigency of the condition, for it was reasonable and for the benefit of all parties, the defendants not less than the prosecutors, that the recognisances should be respited until the next Session of the Central Criminal Court, when the defendants did appear and take their trial; and I doubt whether this did not keep alive the recognisances so as to satisfy the requirements of the statute with reference to the indictment at that Session. But, secondly, whether that be so or not, inasmuch as the prosecutors were bound over to prosecute and the defendants to appear, *the condition of the statute is satisfied so long as the offence to which the recognisances refer is [*551 the same as that on which the defendants are tried. The words of sect. 1 are large enough to receive this construction; and the object of protecting persons against vexatious indictments for the offences specified in it is attained as soon as a magistrate has bound over the prosecutor to appear and prosecute, or an order of a Judge or of the Attorney or Solicitor General to prefer an indictment has been given. The other construction would afford a chance of escape to persons who ought to be put on their trial.

CROMPTON, J.—I am also of opinion that, according to the right construction of stat. 22 & 23 Vict. c. 17, s. 1, it is not necessary that it should be averred in the indictment that the preliminaries required by the statute have been complied with, nor ought such an averment to be placed on the record. In the cases within the statute the grand jury have a general jurisdiction to find a true bill, and the provision in sect. 1 is a restraint on that jurisdiction, as it amounts to a direction to the officer that he is not to lay before them a bill of indictment, and that they are not to find it unless certain preliminaries have taken place. It is not like an Act of Parliament which imposes a penalty, and at the same time restrains proceedings for it; there the penalty does not belong to the plaintiff unless the conditions annexed by the statute have been fulfilled. The practice under stat. 4 & 5 W. & M. c. 18, s. 2, referred to by my brother Blackburn, is in point. Soon after the Revolution the power of filing criminal informations was much abused; and that

*552] statute, passed to check those abuses, enacted in positive *terms that the Clerk of the Crown Office should not receive or file an information at the instance of a private person without express order given by the Court in open Court. The Clerk of the Crown was thus placed much in the same position as the grand jury under stat. 22 & 23 Vict. c. 17. Since stat. 4 & 5 W. & M. c. 18, it has never been stated in a criminal information that it was filed by the order of the Court; that order would indeed be more notorious than the direction of a Judge or of the Attorney or Solicitor General; but, as the Lord Chief Justice said, a defendant would know whether either of those conditions had been performed. Practically there will be no difficulty in carrying out the provision of this statute. The clerk of indictments receives every committal by the justices, and where there has been no committal he would have the direction of a Judge or of the Attorney or Solicitor General for the indictment. And the statute is no more than a direction to him not to allow a bill to be laid before the grand jury unless the conditions have been fulfilled. It would be very inconvenient if, in the case of every indictment for obtaining money by false pretences, which is a most common case, and very near a felony, it was necessary that the performance of the conditions should be averred on the face of the record and proved at the trial. It would be almost ridiculous to bring down a witness from London in every case within the statute to prove the signature of the Judge or of the Attorney or Solicitor General to the direction for preferring the indictment. The effect of an omission to comply with the statute may be doubtful. The question arose in the case of an indictment tried before me at Monmouth, containing one

*553] count with regard to which the present *objection was taken; I thought that the Judge might quash an indictment open to such an objection, and I quashed that count; and though a writ of error was threatened it was not brought. It is not necessary to determine what the exact remedy is if the conditions have not been performed—whether by plea to the jurisdiction, or writ of error, or by way of defence to the indictment, so that the jury ought to acquit. But I think that the Judge ought to quash the indictment if the fact of omission to comply with the conditions in the statute is brought to his knowledge; but if the defendant is found guilty no great harm is done.

Then it is said that a writ of error in fact lies, on the grounds that no direction of a Judge or of the Attorney or Solicitor General for preferring this indictment was given, and that recognisances were not entered into with reference to it. But I am of opinion that the statute has been sufficiently complied with in both branches. I cannot think the statute intends that the offence should be specifically set out in the recognisances. No inconvenience will ensue here, for when a person is brought before a magistrate he knows whether the other party has been bound over to prosecute, and if not there must be the direction of a Judge or of the Attorney or Solicitor General for preferring an indictment.

Next, it is clear that in the present case the prosecutors have been bound over to give evidence of an offence which is conspiracy to cheat and defraud, and the plaintiffs in error have been bound over to meet that charge, and the offence charged in this indictment is the same, and the prosecution in effect the same, though the trial went over to the

next Session. If the *prosecutors do not appear and the Judge enlarges the recognisances the prosecution remains, and the defendants will be in the same position at the next Session. Though the prosecution would not be the same if the offence charged was changed. Also if the recognisances are discharged the prosecution would not be the same; but if the trial is only put off and the recognisances respited it is the same. If the accused do not appear, a warrant would go to bring him in, and the trial would be on the recognisances for the same offence. The only difficulty would be if one indictment were presented and afterwards another before the same Court, but the Court would dispose of that by directing an acquittal upon one. In an indictment for conspiracy it is common to charge that the defendant quibusdam aliis, naming them, conspired to do the act; but the prosecutor is not tied down to prove that all the persons named were co-conspirators. If so, any other specified person may be put in the indictment; and consequently the putting in a fourth defendant does not vary or discharge the recognisances. [*554]

I am of opinion that the recognisances, either one or both, were rightly continued and are now in existence, and that the conditions required by the statute have been fulfilled.

BLACKBURN, J.—Stat. 22 & 23 Vict. c. 17, s. 1, has not changed the essentials in the offence charged or the tribunal which is to try it, but has introduced by proviso a limitation on the general authority of the grand jury, viz., that before a bill is presented to or found by them certain preliminaries shall be complied with. And the question is whether it should be averred in the indictment that these preliminaries have been complied with, *and should be left to the petty jury as a question of fact. Whatever is part of the offence must be found by the petty jury, and what is matter of title is to be found by the grand jury. But this is only a restriction put on the general jurisdiction of the grand jury to find the bill, and is precisely the same as the restriction put on the filing of informations by stat. 4 & 5 W. & M. c. 18, s. 2, that the prosecutor must obtain the leave of the Court in open Court to file it. The pleading in a criminal information since that statute has always been as it was before it, and the practice also has been to try the information as at common law. It is the same under stat. 22 & 23 Vict. c. 18, therefore the first ground of error fails. It may happen that in some cases the preliminaries have not been complied with, although the bill has been presented and found, or some counts may have been inadvertently inserted in the indictment, and then the far more convenient course would be that the defendant, on discovering that the statute has not been complied with, and, as has been pointed out, he cannot be in ignorance of the omission, should apply to the Court, and the Court will quash the whole of the indictment, or those counts with respect to which the preliminaries have not been complied with, which was the course adopted by my brother Crompton at Monmouth. It is possible that some doubt might arise whether the offence charged was within the statute, as in *Reg. v. Heane*, 4 B. & S. 947 (E. C. L. R. vol. 116), and one Court, holding that it was not, might refuse to quash the indictment or strike out the counts, and the prisoner might wish to question that decision in another Court. Perhaps he might plead to the jurisdiction, [*555]

*556] or, if he did not know *of the omission to comply with the statute in time to plead, he might perhaps bring error in fact. But it is not necessary to decide that point in the present case, for I agree with the Lord Chief Justice and my brother Crompton that the conditions imposed by the statute have been fulfilled.

The other condition is, that the person accused should be bound by recognisance to appear to answer to an indictment to be preferred against him for such offence: the facts being that the prisoners were brought before the magistrate and bound over to answer a charge of conspiracy to defraud. This condition has been literally fulfilled, and the spirit of the Act has been complied with; for its object, as stated by the Lord Chief Justice, has been attained. The second bill of indictment, if properly preferred, would not put an end to the recognisances; as they were substantially for the same offence as that for which the defendants were tried. The adding a fourth defendant in the indictment does not vary the substantiality of the charge.

SHEE, J.—The Legislature, in passing stat. 22 & 23 Vict. c. 18, must be taken to have had notice of the mode of preferring indictments, and that they pass through the hands of the officer of the Court; therefore when they use the words “no bill of indictment shall be presented to or found by the grand jury,” &c., they intended nothing more than a direction to that officer to take care that no indictment containing the specified charges shall come before the grand jury unless the conditions have been complied with. They had in view the provisions in stat. 4 & 5 W. & M. c. 18, which recites, in sect. 1, that “divers malicious and *557] contentious *persons have more of late than in times past procured to be exhibited and prosecuted, informations in their Majesties’ Court of King’s Bench at Westminster, against persons in all the counties of England, for trespasses, batteries, and other misdemeanors, and after the parties so informed against have appeared to such informations, and pleaded to issue, the informers do very seldom proceed any further, whereby the persons so informed against are put to great charges in their defence:” and enacts, in sect. 2, that for the future “the clerk of the Crown in the Court of King’s Bench shall not, without express order to be given by the said Court in open Court, exhibit, receive, or file any information for any of the causes aforesaid.” That statute was passed for the prevention of certain evils which then existed in this Court. The question then arises, what is to be done if by inadvertence a bill is presented to and found by the grand jury without the conditions having been complied with? The result would be that, when the fact came to the knowledge of the Court, such an indictment would be treated as a nullity, which would be the same as quashing it. So an information which the Master of the Crown Office had filed without the order of the Court was treated as void.

As to the errors in fact. The first objection is, that the plaintiffs in error have been indicted and convicted for an offence in respect of which they had not entered into recognisances. But the question is, not whether the indictment is the same, but whether the offence with which they are charged is the same as that which they entered into recognisances to appear and plead to,—the condition of the recognisances being to appear *558] and plead to such indictment as might be found against them “for or in respect of the charge aforesaid,” which was a con-

spiracy to defraud. The indictment preferred against them, instead of charging them alone, added a fourth defendant; but the only difference is, that the evidence offered showed that a fourth joined in the conspiracy. Mr. *Giffard* contended, and for some time made an impression on me that he might be right, that the statute was not complied with unless the prosecutor was under recognisances to prosecute, and the person accused was under recognisances to answer to that specific indictment at the time it was preferred and found: but that is not the meaning of the Act. The object of it was to take care that for the offences mentioned in it no person shall be indicted unless a magistrate has thought it right that the prosecutor shall be bound over to prosecute, which implies that the prosecutor is willing to enter into recognisances, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer the charge. These provisions effect the object of preventing the mischief and scandal which had been caused by persons going before the grand jury behind the backs of others and preferring bills against them, which, though entirely groundless, put them to great expense and caused unhappiness to themselves and damage to their character. It is enough that these requisites have at some time been complied with.

Judgment for the Crown.

*The LONDON AND NORTH WESTERN Railway Company, Appellants, The Surveyor for the Township of SKERTON, Respondent. *June 11.* [*559]

Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 46.—Railway over road.—Approaches.—Repair.

Under sect. 46 of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, a railway Company who, in carrying a railway over a highway by a bridge, lowered the level of the highway, is not bound to keep the slope of the road in repair as being part of the approaches on each side of the bridge.

CASE stated by justices under stat. 20 & 21 Vict. c. 43.

The appellants are the lessees of the Lancaster and Carlisle Railway, and for the purposes of this case may be considered as The Lancaster and Carlisle Railway Company.

On the 12th December, 1863, the appellants were summoned under sects. 65 and 142 of The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, before the justices acting for the Petty Sessional Division of Lonsdale South of the Sands, in the county of Lancaster, for the non-repair of the immediate approaches on each side of a bridge constructed by the appellants for the purpose of carrying their railway over a public highway in the township of Skerton leading from Lancaster to Morecambe, the approaches being a work executed in the construction of the railway. Prior to the construction of the railway the highway was repairable and repaired by the respondents. A plan which accompanied the case delineated the railway and the approaches, and showed how the bed of the original highway was altered and lowered by excavation, 9 feet deep in some parts, by the *appellants, at the time of the construction of the railway bridge, for the purpose of enabling the public to pass under it. It was not shown in evidence that

[*560]

the appellants had made good the damage done by them to the surface of the road, or to the road, at the time of their interference with it, or that they had not done so. The respondents have never since repaired the locus in quo, neither have the appellants. The railway was formed about the year 1850. The appellants admitted the non-repair of the highway under, and of the approaches to, the bridge, but contested their liability to keep them in repair after their works had been finished. The justices made an order for the Company to repair the approaches.

The original Lancaster and Carlisle Railway was authorized by an Act of Parliament, 7 & 8 Vict. c. xxxvii., intituled "An Act for making a railway from the Lancaster and Preston Junction Railway at Lancaster to or near to the city of Carlisle." This Act received the Royal assent on the 6th June, 1844, and by sect. 271 it is enacted, "with respect to the crossing of roads," "That (except as herein provided) if the line of the railway cross any turnpike road or public carriage way then either such turnpike road or public carriage way shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width and with the ascent or descent by this Act in that behalf provided; and such bridge and other necessary work connected therewith shall be executed at the expense of the Company."

The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, received the Royal assent on the 8th May, 1845. By sect. 1 it is enacted "That *561] this Act shall apply to *every railway which shall by any Act which shall hereafter be passed be authorized to be constructed, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act." By sect. 46, "With respect to the crossing of roads, or other interference therewith," it is enacted "If the line of railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the Company." By sect. 58, "If in the course of making the railway the Company shall use or interfere with any road they shall from time to time make good all damage done by them to such road."

In the same session of Parliament The Lancaster and Carlisle Company obtained an Act, 8 & 9 Vict. c. lxxxiii., intituled, "An Act to enable The Lancaster and Carlisle Railway Company to alter the line of such railway, and to make a branch therefrom; and for other purposes relating thereto;" and to this Act the Royal assent was given on *562] the 21st July, 1845. The bridge in *question, and a considerable length of railway on each side of it, were constructed and the highway in question was lowered and interfered with under the provisions of the last-mentioned Act; and by sect. 1 it is enacted "that

all the powers to take lands, and all other the powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters, and things contained in the said recited Act (except such of them or such parts thereof respectively as are repugnant to this Act, or as are by this Act expressly repealed, altered, or otherwise provided for) shall extend and be construed to extend to this Act, and shall operate and be in force in respect to the objects and purposes hereof, as fully and effectually, to all intents and purposes whatsoever, as if the same powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters, and things were repeated and re-enacted in this Act." There is no express provision in this Act for incorporating The Railways Clauses Consolidation Act, 1845: and there is no further provision in this Act as to making or maintaining roads or other works.

In 1859, The Lancaster and Carlisle Railway Company obtained another Act, 22 & 23 Vict. c. cxxiv., intituled "An Act for authorizing The Lancaster and Carlisle Railway Company to make new works, and to make arrangements with other Companies, and to raise further funds; and for other purposes." By sect. 2, "The Lands Clauses Consolidation Act, 1845, and The Railways Clauses Consolidation Act, 1845, save so far as any of the clauses and provisions thereof respectively are expressly excepted or varied by this Act, are incorporated with this Act."

The question for the opinion of the Court was, *Whether the appellants are bound to keep in repair the public highway in question under their line and the immediate approaches thereto. [*563

The case was argued, June 8th, before BLACKBURN, MELLOR, and SHEE, JJ.

Bovill, for the respondents.—By stat. 8 & 9 Vict. c. 20, s. 46, "Such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the Company." The part of the highway in question is an immediate approach to the bridge, or at any rate it is one of the necessary works connected therewith. The Company have power to alter, raise and lower public roads; here, in order to carry the road under the railway bridge, the lowering of the road was a necessary work. A retaining wall to preserve the road would be a necessary work connected with the railway bridge. The maintaining of this part of the road is more expensive and requires greater attention than an ordinary part of the road, and having been made by the appellants for their own benefit, they are bound to maintain it.

In *The North Staffordshire Railway Company, appts., Dale and Others, respts.*, 8 E. & B. 836 (E. C. L. R. vol. 92), it was held, that under this section a railway Company having carried a road over the railway by a bridge was bound to keep both bridge and road, and all the approaches thereto, in repair; and that such repair includes not only the structure of the bridge and the approaches, but the metal-ling of the road on both; and the same construction was adopted in **The Trustees of the Newcastle under Lyne, &c., Turnpike Roads, appts., The North Staffordshire Railway Company, respts.*, 5 H. & N. 160. [*564

Staveley Hill, for the appellants.—Under the special Act, 7 & 8 Vict. c. xxxvii. s. 27, the railway Company were required to erect the bridge

with a specified descent, and to execute all necessary works connected therewith, but were not bound to keep them in repair. This latter obligation is laid upon them by the general Act, 8 & 9 Vict. c. 20, s. 61. There is a distinction between the cases where the road goes under and where it goes over the railway. Sect. 49 regulates the construction of bridges in the former case, and sect. 50 in the latter, and they specify the gradients at which such roads shall be constructed. By sect. 61, "if the railway shall cross any highway other than a public carriage-way on the level, the Company shall at their own expense make and at all times maintain convenient ascents and descents and other convenient approaches." [BLACKBURN, J.—That section applies to bridleways and footpaths crossing the railway on a level, and throws no light on the construction of sect. 46. MELLOR, J.—The words "ascents and descents and other convenient approaches" show that the Legislature used the terms "ascent and descent" and "approaches" as equivalent or ejusdem generis.] By sect. 65, "where, under the provisions of this or the special Act, or any Act incorporated therewith, the Company are required to maintain or keep in repair any bridge, fence, approach, gate, or other *565] work executed by them," two justices are *empowered to order the Company to put such work into complete repair. [MELLOR, J.—That section also does not throw any light on the construction of sect. 46. BLACKBURN, J.—Sect. 46 is very obscurely worded in saying "such bridge *with*" instead of "*and* the immediate approaches."] If it had been intended that the surface of the road should be repaired, the section would have said "and the surface of the road underneath the bridge." There can be no reason why, when the length of road and the expense of repairing it remain the same, the onus of maintaining it should be thrown on the Company. Therefore even if the Company are bound to maintain a road over the railway which, but for the cases referred to, might well be argued, there can be no obligation to maintain a road over which the railway passes, but which in other material respects remains unchanged.

By stat. 8 & 9 Vict. c. 20, s. 1, "this Act shall apply to every railway which shall by any Act which shall hereafter be passed be authorized to be constructed, and this Act shall be incorporated with such Act," &c. But sect. 5, reciting that "it may be convenient, in some cases, to incorporate with Acts hereafter to be passed some portion only of the provisions of this Act," enacts, "that, for the purpose of making any such incorporation, it shall be sufficient in any such Act to enact that the clauses of this Act with respect to the matter so proposed to be incorporated (describing such matter, &c.) shall be incorporated with such Act." The two portions are contradictory. Where by sect. 1 the whole Act is incorporated sect. 5 should have given power to exclude clauses. In the special Acts relating to railways it is the practice to mention to what extent the general Act is incorporated; and there is no *566] such *incorporation in this special Act. [BLACKBURN, J.—It is sufficiently plain, though the mode suggested would have been more proper.] Moreover, sect. 1 only incorporates Acts which shall hereafter be passed, and therefore sect. 46 does not affect this railway, which was authorized by an Act passed previously. Though the bridge and highway in question were constructed and interfered with under the provisions of stat. 8 & 9 Vict. c. lxxxiii., that Act received the Royal

assent after stat. 8 & 9 Vict. c. 20, and authorized an alteration of the line: the railway itself was authorized by stat. 7 & 8 Vict. c. xxxvii. [BLACKBURN, J.—This portion of the railway was authorized by the later Act.] The appellants have not made a new road: the duty of repairing it remains on the parish. [BLACKBURN, J.—The question has been decided in Ireland.]

Bovill, in reply.

C. Manley Smith, *amicus curiæ*, referred to the Waterford and Limerick Railway Company, appts., Kearney, respt.; The Limerick and Ennis Railway Company, appts., Kearney, respt., 12 Irish Comm. Law Rep. 224; and *Fosberry v. The Waterford and Limerick Railway Company*, 13 Id. 494. *Cur. adv. vult.*

BLACKBURN, J., now delivered the judgment of the Court.—This case was argued before my brothers Mellor and Shee and myself. The railway Company, in carrying their railway over a highway by a bridge, had lowered the level of the highway; and the question was, whether *they were bound, under sect. 46 of The Railways Clauses Consolidation Act, 1845, to keep the slope of the road in repair as [*567 being part of the approaches on each side of the bridge. On the argument of the case by Mr. *Bovill* and Mr. *Hill* we were inclined to think that the section casts on the railway Company the burden of maintaining those approaches. But Mr. *Manley Smith*, as *amicus curiæ*, said that two cases had been decided in Ireland upon that section, and we find that they are precisely in point. In *The Waterford and Limerick Railway Company*, appts., Kearney, respt., 12 Irish Comm. Law Rep. 224, two of the learned Judges, Fitzgerald and O'Brien, were of opinion that the effect of the section was not to cast the burden on the railway Company, but Hayes, J., differed; so that in that decision there was the opinion of two Judges of the Irish Court of Queen's Bench against one. In the subsequent case of *Fosberry v. The Waterford and Limerick Railway Company*, 13 Irish Comm. Law Rep. 494, in which the same question arose, the whole Court of Common Pleas agreed with the majority of the Court of Queen's Bench: the Chief Justice Monaghan, Ball and Keogh, JJ., agreeing for the same reasons; while Christian, J., gave different reasons, but agreed in the result. On looking into those cases, I feel bound to say that the reasons given by the majority of those learned Judges, especially in the Court of Common Pleas, are very strong. We think, indeed, that those decisions, even if in England, would not be binding on us, there being no appeal from them, and still less are the decisions in Irish Courts binding authorities; so that, if we took a different view of the enactment, we should decide differently. But we ought to pay *considerable respect to those decisions; and [*568 on the construction of this section, which is very obscurely worded, and on which we have ourselves great doubt, though if the matter were *res integra* we might perhaps decide otherwise, these decisions turn the scale. Therefore we hold that the decision of the magistrates was wrong, and must be reversed.

Judgment for the appellants.

CURTIS v. LEWIS. June 9.

Abuse of changing venue.—Retaining counsel.

Where a party at whose instance the venue has been changed abuses his position by retaining counsel in such a manner as to deprive his adversary of the means of procuring counsel, the Court or a Judge will interfere.

THE venue in this cause having been laid in Middlesex, an order was made by Mellor, J., to change it to Glamorganshire on the South Wales Circuit, on the ordinary affidavit of the defendant that the cause of action arose there. After this was done the plaintiff, having discovered that the defendant had retained the only Queen's Counsel on that circuit and the most eminent member of the outer bar, obtained an order from Blackburn, J., that unless the defendant consented to give up one of them the venue should be changed to Herefordshire.

Mellish moved to set aside this latter order.—It is objectionable in principle that the Court should decide on the merits of counsel. [COCKBURN, C. J.—I remember a case where a wealthy party retained all the *569] members of a circuit in the habit of attending Court. That is an unfair thing.] Doubtless where a party has manifestly retained counsel not for his own advantage but in order to prevent his adversary having counsel; but here, according to the law list, there are twenty-seven members of the Circuit in question. [MELLOR, J.—Judges at chambers have often interfered in matters of this nature, though there is no decision of any Court that it is competent for them to do so.] The plaintiff has always the power in the first instance of choosing his counsel, for until the writ is issued none can be retained, but he has lost that advantage in the present case by laying the venue in a wrong county. [He was then stopped.]

Manisty showed cause in the first instance.—When the cause of action is transitory the plaintiff may in general lay the venue where he pleases. [MELLOR, J.—Yes, but a Welsh cause ought in general to be tried in Wales and an English cause in England. The changing the venue is discretionary with the Judge.] The venue would not have been changed here if the Judge had been aware that the defendant would take the course he did.

THE COURT (consisting of COCKBURN, C. J., MELLOR and SHEE, JJ.) said if it were shown that one of the parties had abused his position by acting oppressively in the manner described, the Court or a Judge would interfere. But the present case was not as if there were no other counsel on the Circuit competent to conduct the plaintiff's cause. There were several very competent to do so. Rule absolute.

*570] *MORGAN v. The VALE OF NEATH Railway Company. [July 4.]

Master and servant.—Negligence of fellow-servant.—Liability of master.

M. was employed by a railway Company as their servant to do work as a carpenter to the roof of an engine shed at their station whilst the railway traffic was being carried on in it by their servants. In the course of this employment he was standing upon a scaffold which was erected near to one of the turntables. The porters of the Company who were engaged in

shifting a locomotive engine allowed it to project so far beyond the turntable that, in turning it, the end of the engine, by their negligence, struck against a ladder which constituted one of the supports of the scaffold. The scaffold gave way in consequence, and the plaintiff was thrown off and injured. In an action by M. against the Company: Held, by Blackburn and Mellor, JJ., that the nature of M.'s employment was such as to make him and the servants by whose negligence he suffered servants in a common employment, within the rule which exempts the employer from responsibility to his servant for the consequences of the negligence of a servant in a common employment: Cockburn, C. J., concurring, out of deference to the authority of *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 5 Exch. 343, and *Waller v. The South Eastern Railway Company*, 2 H. & C. 102.

THE declaration stated that the defendants were possessed of a locomotive steam-engine, which was then at a certain station of the defendants at Neath, near to a certain engine-shed there, on which the plaintiff was lawfully employed in doing certain repairs thereto, and the steam-engine was then being turned and moved about on a certain turntable close to the engine-shed, under the care, management, and control of certain servants of the defendants: and thereupon it became and was the duty of the defendants and their servants to use due and proper care, skill and diligence in and about the management of the steam-engine: Yet the defendants so carelessly, improperly, negligently and unskilfully managed the steam-engine, and took so little care in such management, that, by the wrongful act, neglect and mismanagement of the defendants and their servants, the steam-engine was driven against and struck *a ladder, by which a certain scaffolding, on which [*571 the plaintiff was then standing for the purpose of doing the repairs to the engine-shed was in part supported, and thereby caused the scaffolding to fall and come down, and the plaintiff to be thrown violently to the ground; by means whereof the plaintiff was severely bruised, hurt and wounded, and permanently injured and rendered unfit for work, and incurred great expense and loss of time in endeavouring to be cured of the said injuries.

Plea. Not guilty.

On the trial, before Wilde, B., at the Glamorganshire Summer Assizes, 1863, the following facts appeared. The plaintiff was by trade a carpenter, and in December, 1862, was with other carpenters in the employment of the defendants at weekly wages. The duties of the carpenters in the employment of the Company are to perform all carpenter's work they may be directed to do by the inspector of the line for the general purposes of the Company. On the 23d December the plaintiff was employed by the defendants to do certain carpenter's work to the roof of an engine shed situate at the Neath Station of the defendants' railway, for the doing of which it was necessary that a scaffold should be erected near a certain turntable of the defendants, on and by means of which their engines and carriages were moved and turned by their porters and servants. The scaffold was erected accordingly in the proper position to enable the plaintiff to do such work, and was in all respects proper and sufficient as regards materials and construction for the purposes for which it was required to be used. The plaintiff had ascended the scaffold and was standing thereon in the performance of his work as a carpenter on the roof of the shed, when certain railway *porters in the employ of the defendants, who were in the course [*572 of such employment engaged in shifting a locomotive engine by means of the turntable, allowed the engine to project so far beyond the

same that in turning the engine the end of it struck against and displaced a ladder which constituted one of the supports of the scaffold. The scaffold gave way in consequence, and the plaintiff was precipitated from it to the ground, and received thereby severe bodily injuries. The occurrence was caused solely by the negligence and carelessness of the defendants' servants in the management of the engine and turntable, and was not in any way attributable to contributory negligence on the part of the plaintiff or of any other persons.

It was objected, on the part of the defendants, that the plaintiff and the persons through whose negligence the injury was caused being alike the servants of the Company, and the injury having occurred when they were severally engaged in doing the Company's work, the defendants were not liable; whilst, on behalf of the plaintiff, it was contended, that the plaintiff and the servants who caused the injury were engaged in different operations and distinct departments of work, and that there was, under the circumstances, no such community of employment between the plaintiff and those servants as to exempt the defendants from liability for the negligent act which caused the injury.

The learned Judge thereupon nonsuited the plaintiff, but gave him leave to enter a verdict for an agreed sum.

Grove, in Michaelmas Term, 1863, obtained a rule nisi accordingly, on the ground that there was no common employment such as to exempt the defendants from liability.

*573] *In Easter Term, May 2d, before COCKBURN, C. J., BLACKBURN and MELLOR, JJ.,

Giffard and *J. W. Bowen* showed cause.—Where the injured servant and the other servant whose negligence caused the injury were engaged in a common employment for a common purpose under the same master, so that the former, when he entered into the service, might reasonably have contemplated the risk of sustaining injury from the negligence of the latter, an action is not maintainable against the master: *Hutchinson v. The York, Newcastle and Berwick Railway Company*, 5 Exch. 343; *Waller v. The South Eastern Railway Company*, 2 H. & C. 102. But if the employment of the injured servant is so foreign to that in which the other servant is engaged that the former could not have known or expected any risks from negligence of fellow-servants he may be considered as a stranger to his master for the purpose of bringing an action against him: *Bartonshill Coal Company*, appts., *Reid*, respt., *Same*, appts., *McGuire*, respt., 3 Macq. 266, Id. 300, 307. In the former case, p. 295, Lord Cranworth gives the criterion that, to constitute fellow-labourers within the doctrine which protects the master from this responsibility, "it is not necessary for this purpose that the workman causing and the workman sustaining the injury should both be engaged in performing the same or similar acts. The driver and the guard of a stage-coach, the steersman and the rowers of a boat, the workman who draws the red hot iron from the forge and those who hammer it into shape, the engineman who conducts a train and the man who regulates the switches or the signals, are *all engaged in a common work.

*574] And so in this case, the man who lets the miners down into the mine, in order that they may work the coal, and afterwards brings them up, together with the coal which they have dug, is certainly engaged in a common work with the miners themselves. They are all contributing

directly to the common object of their common employer, in bringing the coal to the surface."

In *McNaughton v. The Caledonian Railway Company*, 19 Court of Sess. Ca. 271, 273, note, the Lord Ordinary puts, as exceptions from the rule in *Priestley v. Fowler*, 3 M. & W. 1, the following cases in which the two persons, viz., the wrongdoer and the injured, "though both at the time servants of one master, are engaged in different operations, and in distinct departments of work. A dairymaid is bringing home milk from the farm, and is carelessly driven over by the coachman. A painter or slater is engaged at his work on the top of a high ladder, placed against the side of a country-house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder and upsets it. A clerk in a shipping Company's office is sent on board a ship belonging to the Company with a message to the captain, and he meets with injury by falling through a hatchway, which the mate has carelessly left unfastened, though apparently closed. A ploughman is at work on a piece of ground held by a railway Company, and adjacent to a railway, and is, while in the employment of the Company, killed by an engine, which, through the rashness or carelessness of the engine-driver, leaps from the line of rails into the field."

But it is clearly not necessary that the wrongdoer and the person injured should be in the same form *of employment: *Hutchinson v. The York, Newcastle and Berwick Railway Company*, 5 Exch. [*575 843, which was treated in both cases in the House of Lords as properly expounding the law. And here the plaintiff, who was employed in doing jobs about the railway-station, must have contemplated the possibility of accidents from the negligence of his fellow-servants: the repairing of the shed in order to protect the engines from the weather is ancillary to and for the purpose of carrying on the general business of the railway Company. [They referred to the American cases, *Albro v. The Agawam Canal Company*, 6 Cush. 75, *Hayes v. The Western Railroad Corporation*, 3 Id. 270, *Gillshannon v. The Stony-Brook Railroad Corporation*, 10 Id. 228, cited in *Manley Smith's Law of Master and Servant*, 2d ed., pp. 136, 145; *Wigget v. Fox*, 11 Exch. 832, 835, 6, 7, per Pollock, C. B. and Alderson, B.; *Vose v. The Lancashire and Yorkshire Railway Company*, 2 H. & N. 728, 734, where the Court of Exchequer expressed its opinion that extreme caution should be used not to relax the rule; *Griffiths v. Gidlow*, 3 H. & N. 648, 656.

G. B. Hughes, in support of the rule.—The question is, whether there was such a community of employment of the plaintiff and the other servants, whose negligence caused the injury to him, as to make it an ordinary risk which the plaintiff took upon him when he entered into the service of the defendants. Within the last few years' the tendency of the Courts has been to qualify the doctrine introduced by *Priestley v. Fowler*, 3 M. & W. 1; and in order to exempt the master from responsibility to his servant for the negligence of fellow-servants, there [*576 *must be a common object as well as a common employment of the servant injured and the servant who has caused the injury. In *Holmes v. Clarke*, 6 H. & N. 349,(a) Pollock, C. B., said, pp. 356-7, "The doctrine on this subject has arisen since Lord Abinger took his seat in this Court: before that time there is no instance of such an ac-

(a) Affirmed on appeal, 7 H. & N. 937.

tion. In subsequent cases the doctrine has been somewhat qualified. If the master is aware of some defect in his machinery, or that a rope or a scaffold is not safe, and he directs his servant to use it, he is responsible. It must not be assumed that in no case can a servant maintain an action against his master in respect of injury caused by a fellow-servant. It would be quite consistent with the authorities if we were to hold that a footman might recover against his master for injury arising from the neglect of the coachman or groom, the services being different." In *Tarrant v. Webb*, 18 C. B. 797 (E. C. L. R. vol. 86), an exception was introduced where the master was guilty of want of care in the selection of proper servants. The present case falls within *McNaughton v. The Caledonian Railway Company*, 19 Court of Sess. Ca. 271, affirming the judgment of the Lord Ordinary. [BLACKBURN, J.—As to the cases which the Lord Ordinary puts, I by no means agree that when a clerk of a shipping Company is sent on board a ship belonging to the Company with a message, the rule of exemption would not apply; and the painter or slater supposed to be injured by the carelessness of the gardener is not usually the servant of the man who employs the gardener.] In *Bartonsill Coal Company, appts., McGuire, respt.*, 3 Macq. 300, Lord Chelmsford, C., said, p. 311, "The case of *McNaughton v. The* *577] *Caledonian Railway Company* may be sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work; the deceased being a joiner or carpenter, who at the time of the accident was engaged in repairing a railway-carriage, and the persons by whose negligence his death was occasioned the engine-driver and the person who arranged the switches." And Lord Brougham, p. 313, said, "To bring the case within the exemption, there must be this most material qualification, that the two servants shall be men in the same common employment, and engaged in the same common work under that common employment." In the present case the repair of the shed and the management of the railway traffic are not a common employment for this purpose. [He also cited *Fletcher v. Peto*, 3 F. & F. 368.]

Cur. adv. vult.

The following judgments were delivered.

BLACKBURN, J.—In this case the plaintiff was employed by the defendants as their servant to do work as a carpenter on their station whilst the railway traffic was being carried on in it by the servants of the defendants. In the course of this employment he was standing upon a scaffold which was erected near to one of the turntables. The servants of the defendants who were engaged in shifting a locomotive engine allowed it to project so far beyond the turntable that, in turning, the end of the engine struck against a ladder which constituted one of the *578] supports of the scaffold. The scaffold *gave way in consequence, and the plaintiff was thrown off and injured. The plaintiff was nonsuited, with leave to move to enter a verdict for the plaintiff.

It must be taken to have been proved at the trial that there was negligence on the part of those shifting the engine, and no contributing negligence on the part of the plaintiff, so that the plaintiff might have maintained an action against those actually shifting the engine, and also against their masters, the defendants, unless the fact that the plaintiff was also the servant of the defendants forms a defence; and the ques-

tion of law reserved must be taken to be whether the nature of the plaintiff's employment was such as to make him and the servants, by whose negligence he suffered, servants in a common employment, or as it is sometimes called, "collaborateurs," within the rule which exempts the employer from responsibility to his servant for the consequences of the negligence of a servant in a common employment.

I am of opinion that this rule ought to be discharged, as I think that the facts bring the case within the principle of the class of cases of which *Hutchinson v. The York, Newcastle and Berwick Railway Company*, 5 Exch. 343, was the first decided in an English Court; but which had previously been acted upon in America in the case of *Farwell v. The Boston and Worcester Railroad Corporation*, 4 Metcalf 49.(a)

That principle I take to be that a servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such *ser- [*579 vices; the presumption of law being that the compensation was adjusted accordingly, or, in other words, that these risks are considered in his wages. And that, where the nature of the service is such that, as a natural incident to that service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant by his contract takes upon himself as between him and his master; and consequently that he cannot recover against his master for an injury so caused, because, as is said by Shaw, C. J., in *Farwell v. The Boston and Worcester Railroad Corporation*, he "does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied."

If the master has by his own personal negligence or malfeasance enhanced the risk to which the servant is exposed beyond those natural risks of the employment which must be presumed to have been in contemplation when the employment was accepted, as, for instance, by knowingly employing incompetent servants, or supplying defective machinery, or the like, no defence founded on this principle can apply; for the servant does not, as an implied part of his contract, take upon himself any other risks than those naturally incident to the employment.

No such point, however, arises in the present case; it was not suggested that the defendants negligently employed servants to manage their traffic who were not competent to do so, nor that the turntables were improperly made. The one point made was that the plaintiff, [*580 *who was employed to do carpenter's work on the station, was not employed in the same work as those who were employed in working the railway traffic; and it was contended that it was essential that the servants should be in a common employment and working for a common object. I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost if not every case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the

(a) Also printed in 3 Macq. 316.

one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think that, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule.

In *Hutchinson v. The York, Newcastle and Berwick Railway Company*, 5 Exch. 343, the Company's servant, who went as their servant in one of their trains, was, as one of the necessary and ordinary consequences of so doing, exposed to risk of injury from the negligence of those who worked the traffic, and the judgment of the Court of Exchequer that his representatives could not recover against *the Com-
*581] pany for his death caused by the negligence of their servants working the traffic was on the principle I have just stated; his death was held to be caused by a want of skill the risk of which the deceased had as between himself and the defendants agreed to run. I think it would be difficult to show that Hutchinson and those who worked the train which ran into him were engaged in any common service in any sense of the words which would not include the present case.

In *The Bartonshill Coal Company, appts., McGuire, respt.*, 3 Macq. 800, Lord Chelmsford, C., in commenting on the cases on this subject, observes, pp. 807-8, that in them "it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case, to ascertain whether the servants are fellow-labourers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him. There may be some nicety and difficulty in particular cases in deciding whether a common employment exists; but in general, by keeping in view what the servant must have known or
*582] expected to have been involved in the service *which he undertakes, a satisfactory conclusion may be arrived at." These observations were made in a case in which the House of Lords reversed the decision of the Scotch Court of Session; who had held that the owners of the colliery were responsible to the miners whom they employed for the negligence of their servant employed to work the engine which drew them up, on the ground that they were not servants employed in common work.

All the law Lords, in delivering their opinions that the Court of Session were wrong in this decision, concurred in saying that there was no inflexible rule of law releasing the master from responsibility in every case where the person injured by the negligence of his servant was at

the time of the injury in the same master's service; and they certainly use language which, like part of what I have cited from Lord Chelmsford's opinion, seems to point to the common object of the service as being the limit of the rule; but, as was observed by Lord Chelmsford himself with reference to the former decision, there was nothing in the nature of the case before them to call for a precise definition of the limit; it was only necessary to decide that the case before them fell within it. I think, however, the principle which I consider the true one is sufficiently indicated by Lord Chelmsford in the passage I have just quoted, and by Lord Cranworth throughout his judgment in *Bartonshill Coal Company*, appt., Reid, respt., 3 Macq. 266. In *Waller v. The South Eastern Railway Company*, 32 L. J. Exch. 205, (a) Pollock, C. B., in his judgment refers to the observations *thrown out by Lord Chelmsford, and the Chief Baron in effect says, that in order to [*583 decide the case before him he considers what are the dangers which any servant engages to encounter, and looks at the probable dangers attendant upon entering the engagement in question. This I think the true principle, and that the difficulty is to apply it in each case.

Applying that principle to the case before them, the Court of Exchequer decided that a guard of a railway train had taken upon himself the risk of injury from the negligence of the servants whose duty it was to see that the rails were in good order. And, applying the same principle to the present case, I think that we ought to hold that the plaintiff, in accepting an employment to work in the station whilst the traffic was being carried on, and which must have brought him close to the traffic, accepted one which necessarily must have exposed him to danger from the carelessness of those conducting the traffic, and must be taken as between himself and his employers to have taken upon himself that risk.

In this judgment my brother MELLOR concurs.

COCKBURN, C. J.—I concur with the rest of the Court in discharging the rule in this case, but I am desirous it should be understood that I do so solely out of deference to the authority of *Hutchinson v. The York, Newcastle and Berwick Railway Company*, 5 Exch. 343, and *Waller v. The South Eastern Railway Company*, 2 H. & C. 102. But for the decisions in these cases I should have been disposed to think, that a workman employed to do carpenter's work for a railway Company and the servants of the *Company engaged in conducting the traffic of the railway, though in the service of a common employer, were not fellow-labourers engaged in a common work under the common employment so as to exempt the master from liability for injury arising to the one servant from the negligence of the other. The Court of Exchequer having however held, in the first case, that a servant of the railway Company travelling on their business in one of their trains, was the fellow-servant of those who had charge of the train; and in the second, that the ganger of the platelayers, whose business it was to keep the permanent way in repair, and the guard of a train, were fellow-labourers so as to exempt the Company from liability in respect of injury sustained by the one servant through the negligence of the other; it seems to me that the present case comes within the principle of those

(a) In the report of that case in 2 H. & C. 102, Pollock, C.B., p. 110, is reported as referring to the observation of Lord Cranworth in *Bartonshill Coal Company*, appts., Reid, resp., 3 Macq. 266, 284.

decisions, and consequently that we have no alternative but to discharge this rule, leaving the plaintiff to have recourse to a Court of appeal if it is thought desirable that the principle involved in those decisions should be further considered.

Rule discharged.

*585] *Ex parte MITCHAM. June 9.

Commissioners of Police.—6 & 7 Vict. c. 86.—13 & 14 Vict. c. 7.—Conductor's license.

A person holding the license of conductor of a metropolitan stage carriage, under stat. 6 & 7 Vict. c. 86, had been convicted and fined three times by justices, who, however, did not revoke or suspend his license, as they were empowered to do by sect. 25. On his applying for a renewal of his license in the mode prescribed by that Act, the Commissioners of Police, under stat. 13 & 14 Vict. c. 7, refused it, on the ground of the convictions, but said they would grant it after a month: Held that they were justified in this course.

THIS was an application for a mandamus to the Commissioners of Police to grant a fresh license to a person as conductor of a metropolitan stage carriage. The former license expired on the 1st June, and the application for its renewal was made in the regular form, accompanied by the usual certificate, but the Commissioners refused to renew it then on the ground that he had been three times convicted before justices of the peace and fined, but told him they would grant it on the 1st July if he applied.

Stat. 6 & 7 Vict. c. 86, "for regulating hackney and stage carriages in and near London," by sect. 5 creates a registrar of Metropolitan public carriages.

Sect. 8. "It shall be lawful for the registrar to grant a license to act as driver of hackney carriages, or as driver or as conductor of Metropolitan stage carriages, or as waterman (as the case may be), to any person who shall produce such a certificate as shall satisfy the said registrar of his good behaviour and fitness for such situation respectively."

Sect. 14. "Before any such license as aforesaid shall be granted a
*586] requisition for the same, in such form as *the said registrar shall from time to time appoint for that purpose, and accompanied with such certificate as hereinbefore is required, shall be made and signed by the person by whom such license shall be required, &c., and every person applying for or attempting to procure any such license, who shall make or cause to be made any false representation in regard to any of the said particulars, &c., or who shall not truly answer all questions which shall be demanded of him in relation to such application for a license, &c., or who shall, in regard to such application, wilfully and knowingly make any misrepresentation, shall forfeit for every such offence the sum of 5*l*."

Sect. 25 empowers any justice of the peace, before whom any driver, conductor, or waterman shall be convicted of any offence, whether under that Act or any other Act, in his discretion to revoke or suspend the license, and send it to the registrar.

By stat. 13 & 14 Vict. c. 7, the duties of the registrar are transferred to the Commissioners of Police.

Edward James, in support of the application.—Sect. 8 of stat. 6 &

7 Vict. c. 86, renders it compulsory on the Commissioners to grant a license like the present on production of a certificate which satisfies them of the applicant's "good behaviour and fitness" for the situation. [COCKBURN, C. J.—Sect. 14 shows that is not so; for it empowers the Commissioners to ask any question they see fit respecting the application. Suppose, while the man is before the Commissioners, a person comes in and proves that the applicant is a pickpocket.] That would be a ground for dissatisfaction. His having been previously convicted and fined for offences is immaterial, *as for these he has been [*587 already punished by the justices, who did not think it necessary to revoke or suspend his license as they might have done, so that, in making those offences ground for not renewing the license, the Commissioners are inflicting a punishment not warranted by law.

COCKBURN, C. J.—I am clearly of opinion that we ought not to interfere. The authority and jurisdiction of the Commissioners of Police are very essential to restrain improper conduct in these men. It is quite clear the Commissioners are not bound to be satisfied with a certificate good on the face of it, but are entitled to see, and it is their duty to see, to the behaviour of persons applying for licenses. It clearly appears, from sect. 14 of stat. 6 & 7 Vict. c. 86, that on application for a license they may put any questions they think right. Now, when it comes to be disclosed, as it is here, that a man has been three times convicted and fined, it is quite competent for them to say "We will not grant you a license." Then, if they could refuse the license altogether, it is competent to them to say to the applicant, "What you have done during the last year is sufficient reason why we should not at once grant you a license. But hoping that this will be a salutary warning and check on your conduct we will suspend it, and if you come again in a month we will give it to you." That seems a very moderate and wise course.

MELLOR and SHEE, JJ., concurring, Rule refused.

***CHAMBERS v. THE MANCHESTER and MILFORD** [*588
Railway Company. June 22.

Railway Company.—7 & 8 Vict. c. 85.—*Companies Clauses Consolidation Act, 1845,*
 8 & 9 Vict. c. 16.—*Borrowing powers.*—*Lloyd's bonds.*

A railway Company were empowered by their special Act to raise a capital of 555,000*l.*, and to raise by mortgage any further sum not exceeding 185,000*l.*; but no part of such further sum was to be raised until the whole of the capital had been subscribed for and one-half paid up. Part only of the capital was subscribed for; but the Company, being in want of money, determined to borrow 10,000*l.* to enable them to pay debts due to the contractor, engineer, solicitors, and for land, and also to meet a claim made by W. C. for travelling expenses and loss of time. The directors applied to their bankers, and obtained the sum required on the security of the joint and several promissory note of W. C. the then chairman of the Company, and of B., one of the directors. B., having been compelled to pay the money, brought an action against W. C. for contribution. The board of directors resolved that, "in order to discharge the liability of the chairman in the action of B. against him, the secretary be authorized to seal Lloyd's bonds to the extent of," &c. Bonds were accordingly sealed with the common seal of the Company, by each of which the Company "acknowledge that they stand indebted to W. C. in the sum of 1000*l.* for money due and owing from the said Company to the said W. C.; and the said Company, for themselves, their successors and assigns, hereby covenant with the said W. C., his executors and administrators, to pay to him, his executors, administrators, or assigns, the said sum of 1000*l.*, &c." These bonds were delivered to W. C.,

and he assigned them to one D. to secure money advanced by him, and with which money the action brought by B. against W. C. was settled. Subsequently, the directors resolved that the bonds should be redeemed, and that the expenses incurred by the chairman should be paid by the Company out of the first moneys in their hands. In an action brought by W. C. upon one of these bonds, held that, taking into consideration stat. 7 & 8 Vict. c. 85, The Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, and the special Act, the bond was illegal, and that he could not recover.

THE first count of the declaration stated that the defendants, by deed under their common seal bearing date the 28th May, 1863, acknowledged that they stood indebted to the plaintiff in the sum of 1000*l.* for money due and owing from the defendants to the plaintiff, and the defendants thereby covenanted with the plaintiff to pay to him, his executors, administrators or assigns, that sum upon the 28th May, 1866, and also interest at the rate of 5 per cent. per annum from the date *589] thereof *until payment, such interest to be payable half-yearly upon the 28th November and the 28th May in each year, and of which interest one half-year was due and unpaid. The second, third, fourth, fifth and sixth counts were for interest upon five other deeds of the same date and for the same amount. There were also counts for interest and on accounts stated.

The defendants pleaded, amongst other pleas, first, to the first, second, third, fourth, fifth and sixth counts respectively, *non est factum*; and to the residue of the declaration, never indebted.

Issues thereon.

The defendants had also pleaded to the first, second, third, fourth, fifth and sixth counts, a plea by way of defence on equitable grounds, an abstract of which was as follows:—That the alleged deeds were made and entered into by the defendants, through the plaintiff and other directors for the time being of the Company, for the purpose of raising and borrowing the moneys therein respectively mentioned, and that at the time of the making of the said deeds respectively the defendants had not any power whatever to raise or borrow the said moneys. But, by order of Mellor, J., this plea was disallowed upon the plaintiff undertaking to admit on the trial evidence of the matters stated in the abstract of it to be given in evidence under the plea of *non est factum* or never indebted.

On the trial, before Erle, C. J., at the Spring Assizes for the county of Surrey, it appeared that the defendants were incorporated under The Manchester and Milford Railway Act, 1860, 23 & 24 Vict. c. clxxv., and that in 1861, being in want of money for the payment of debts due to the contractor, engineer, solicitors, and for land, and also to meet a *590] claim made by the plaintiff for *1400*l.* due to him for travelling expenses and loss of time, applied to their bankers, The Union Bank of London, for the loan of a sum of money, who ultimately agreed to advance the sum of 10,000*l.* on the promissory note of the directors. At a meeting of the board of directors held on March 7th 1861, the plaintiff, who was then chairman of the Company, and Barrow a co-director and the present chairman of the Company, were authorized to sign the necessary notes for the amount of 10,000*l.* on behalf of the Company, on the condition that the proceeds of the calls made on the shareholders be first applied in liquidation of that sum. The plaintiff and Barrow thereupon signed a joint and several promissory note, which

was handed to the bankers on the advance of the money, and they afterwards renewed the note more than once.

In April, 1863, the bank required payment of the note, and Barrow, in order to prevent legal proceedings which they threatened to take against him, paid the balance of 9500*l.* and interest due upon it, and sued the plaintiff for contribution. At a meeting of the board of directors held on the 5th May, 1863, the board discussed the question as to the issue of Lloyd's bonds as security for a loan to pay off the liability of the plaintiff, and it was resolved that counsel's opinion be taken as to whether they could be legally issued. At a meeting of the board on the 26th of May, "It was resolved, that in order to discharge the liability of the chairman in the action of Mr. Barrow against him, the secretary be authorized to seal Lloyd's bonds to the extent of 7000*l.*, to be deposited for twelve months, together with the chairman's promissory note for securing 5000*l.* and interest at 6 per cent., and commission at 5 per cent." The plaintiff as chairman of the Company was a party to all the *proceedings. Pursuant to this resolution [*591 the bonds to that amount, which according to their value in the market would be equivalent to 5000*l.*, were sealed and delivered to the plaintiff, and he afterwards assigned them to one Denham as security for a loan of 5000*l.* and interest: the assignment containing a covenant that the assignee might sue in the name of the plaintiff in case of non-payment. On the 5th June, 1863, the plaintiff paid Barrow the debt and costs due to the latter under a Judge's order to stay proceedings.

At a meeting of the board held on the 5th August, 1863, it was resolved, "that the Lloyd's bonds amounting to 7000*l.* given as a security for the liability of the chairman under the bill for 9500*l.* held by the Union Bank, be redeemed, and that his expenses in raising that money be paid by the Company out of the first moneys in the hands of the Company." The bonds were never redeemed pursuant to this resolution.

The following is a copy of one of the bonds on which the action was brought.

"The Manchester and Milford Railway Company.

"Stamp 1*l.* 5*s.*

"Bond for 1000*l.*

"No. 1.

"The Manchester and Milford Railway Company do hereby acknowledge that they stand indebted to William Chambers, of, &c., in the sum of 1000*l.* for money due and owing from the said Company to the said William Chambers. And the said Company, for themselves, their successors and assigns, hereby covenant with the said William Chambers, his executors and administrators, to pay to him, his executors, administrators or assigns, the said sum of 1000*l.* upon the 28th day of May, 1866, and also interest thereon at the rate of 5*l.* *per [*592 cent. per annum from the date hereof until payment, such interest to be payable half-yearly upon the 1st day of January and the 1st day of July in each year.

"Given under the common seal of the said Company, the 28th day of May, 1863.

"A. BEESTON, Secretary."

(Seal of the Company.)

No entry of the bonds having been given was made either on the

minutes of the Company or in their books, and no entry of such bonds had been registered pursuant to The Companies Clauses Consolidation Act, 1845, sects. 39–55.

It was objected for the defendants: Firstly, that the bonds were invalid inasmuch as the borrowing power of the Company was limited by sect. 8 of their special Act, 23 & 24 Vict. c. clxxv., and sect 38 of The Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16. Secondly, that they were rendered illegal by stat. 7 & 8 Vict. c. 85, s. 19.

A verdict was entered for the plaintiff, leave being reserved to move to enter a nonsuit.

In Easter Term, *Lush* obtained a rule nisi accordingly.

Stat. 7 & 8 Vict. c. 85, s. 19, "Whereas many railway Companies have borrowed money in a manner unauthorized by their Acts of incorporation or other Acts of Parliament relating to the said Companies, upon the security of loan notes or other instruments purporting to give a security for the repayment of the principal sums borrowed at certain dates, and for the payment of interest thereon in the mean time: And whereas such loan notes or other securities issued otherwise than under the provisions of some Act or Acts of Parliament have no legal validity, *593] and it is expedient that the issue *of such illegal securities should be stopped; but such loan notes or other securities having been issued and received in good faith as between the borrower and lender, and for the most part for the lawful purposes of the undertaking, and in ignorance of their legal invalidity, it is expedient to confirm such as have been already issued"; be it enacted, "That from and after the passing of this Act any railway Company issuing any loan note or other negotiable or assignable instrument purporting to bind the Company as a legal security for money advanced to the said railway Company otherwise than under the provisions of some Act or Acts of Parliament authorizing the said railway Company to raise such money and to issue such security, shall for every such offence forfeit to Her Majesty a sum equal to the sum for which such loan note or other instrument purports to be such security: Provided always, that any Company may renew any such loan note or other instrument issued by them prior to the passing of this Act for any period or periods not exceeding five years from the passing of this Act."

Sect. 20. "Where any railway Company, before the 12th day of July, 1844, shall have issued or contracted to issue any such loan notes or other unauthorized instruments, the Company may and shall pay off such loan notes or other instruments as the same may fall due, subject as hereinbefore provided; and until the same shall be so paid off the said loan notes or other instruments shall entitle the holders thereof to the payment by the Company of the principal sum and interest thereby agreed to be paid."

Stat. 8 & 9 Vict. c. 16.

*594] Sects. 38–55 have the heading "With respect to the *borrowing of money by the Company on mortgage or bond."

Sect. 38. "If the Company be authorized by the special Act to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special Act, to borrow on mortgage or bond such sums of money as shall from time to time, by an order of a

general meeting of the Company, be authorized to be borrowed, not exceeding in the whole the sum prescribed by the special Act, and for securing the repayment of the money so borrowed, with interest, to mortgage the undertaking, and the future calls on the shareholders, or to give bonds in manner hereinafter mentioned."

Sect. 40. "Where by the special Act the Company shall be restricted from borrowing any money on mortgage or bond until a definite portion of their capital shall be subscribed or paid up, or where by this or the special Act the authority of a general meeting is required for such borrowing, the certificate of a justice that such definite portion of the capital has been subscribed or paid up, and a copy of the order of a general meeting of the Company authorizing the borrowing of any money, certified by one of the directors or by the secretary to be a true copy, shall be sufficient evidence of the fact of the capital required to be subscribed or paid up having been so subscribed or paid up, and of the order for borrowing money having been made; and upon production to any justice of the books of the Company, and of such other evidence as he shall think sufficient, such justice shall grant the certificate aforesaid."

Sect. 41. "Every mortgage and bond for securing money borrowed by the Company shall be by deed under *the common seal of the Company, duly stamped, and wherein the consideration shall be [*595 truly stated; and every such mortgage deed or bond may be according to the form in the Schedule (C.) or (D.) to this Act annexed, or to the like effect."

Sect. 45. "A register of mortgages and bonds shall be kept by the secretary, and within fourteen days after the date of any such mortgage or bond an entry or memorial specifying the number and date of such mortgage or bond, and the sums secured thereby, and the names of the parties thereto, with their proper additions, shall be made in such register; and such register may be perused at all reasonable times by any of the shareholders, or by any mortgagee or bond creditor of the Company, or by any person interested in any such mortgage or bond, without fee or reward."

Sect. 46. "Any party entitled to any such mortgage or bond may from time to time transfer his right and interest therein to any other person; and every such transfer shall be by deed duly stamped, wherein the consideration shall be truly stated; and every such transfer may be according to the form in the Schedule (E.) to this Act annexed, or to the like effect."

Sect. 90. "The directors shall have the management and superintendence of the affairs of the Company, and they may lawfully exercise all the powers of the Company, except as to such matters as are directed by this or the special Act to be transacted by a general meeting of the Company, but all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this and the special Act; and the exercise of all such powers shall be subject also to the control *and regulation of any general meeting specially convened for [*596 the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting."

Sect. 91. "Except as otherwise provided by the special Act, the following powers of the Company (that is to say) the choice and removal of the directors, &c., the determination as to the remuneration of the

directors, auditors, treasurer, and secretary, the determination as to the amount of money to be borrowed on mortgage, the determination as to the augmentation of capital, and the declaration of dividends, shall be exercised only at a general meeting of the Company."

Stat. 23 & 24 Vict. c. clxxv. s. 5. "Subject to the powers of converting loans into capital in 'The Companies Clauses Consolidation Act, 1845,' contained, the capital of the Company in shares shall be 555,000*l.*, and all and every part of the moneys so to be raised shall be applied only in carrying into execution the objects and purposes of this Act."

Sect. 8. "It shall be lawful for the Company to borrow on mortgage of their undertaking any sums of money not exceeding in the whole the sum of 185,000*l.*; but no part of that sum shall be borrowed until the whole of the said capital of 555,000*l.* shall have been subscribed for, and until they shall prove to the justice who is to certify under the provisions contained in sect. 40 of 'The Companies Clauses Consolidation Act, 1845,' before he so certifies, that all such capital has been subscribed for bonâ fide, and is held by subscribers or their assigns, and *597] for which such subscribers or their *assigns are legally liable, and until one-half of such capital shall have been paid up, and all and every part of the money so to be borrowed shall be applied in carrying the purposes of this Act into execution."

The case was argued June 21, 22, and judgment given on the latter day.

Bovill and *L. Kelly* showed cause.—An incorporated Company may borrow money on bond unless such mode of borrowing is expressly prohibited by their special Act or some Act incorporated with it. [They cited *The South Yorkshire Railway and River Dun Company v. The Great Northern Railway Company*, 9 Exch. 55, 84, per Parke, B.; *Bateman v. The Mayor of Ashton-under-Lyne*, 3 H. & N. 323, 335, per Martin, B.; *Payne v. The Mayor of Brecon*, Id. 572, 578, per Martin, B.] This was not a borrowing on mortgage of the undertaking, and therefore sect. 8 of the special Act, 23 & 24 Vict. c. clxxv., does not apply. [They cited *McCormick v. Parry*, 7 Exch. 355.] Sect. 1 of that Act incorporated with it *The Companies Clauses, The Lands Clauses and The Railways Clauses Consolidation Acts, 1845, 8 & 9 Vict. cc. 16, 18, 20.* Sect. 38 of stat. 8 & 9 Vict. c. 16, requires the sanction of a general meeting of the Company to the exercise of their power of borrowing on mortgage or bond under sect. 8 of the special Act; but neither this nor the other sections apply to prohibit directors from issuing bonds in acknowledgment of a liability or debt already existing. Stat. 8 & 9 Vict. c. 16, s. 90, gives large powers to the directors; and sect. 91 only imposes a restriction on their power of borrowing money on mortgage. In Bill *598] *v. The Darent Valley Railway Company*, 1 H. & N. 305, it was held no answer to an action by the secretary of the Company for his salary that there had been no determination at a general meeting as to his remuneration as required by sect. 91. In a Court of equity the plaintiff would be entitled on these bonds as against the Company. In *Troup's Case, The Electric Telegraph Company of Ireland*, 29 Beav. 353, *Hoare's Case, In re the same Company*, 30 Id. 225, the directors of a Company, having no power by their deed of settlement to borrow money, but having done so under circumstances similar to the present, and the money having been bonâ fide applied to the purposes of the

Company, the secretary of the Company, who had borrowed the money with the authority and sanction of the directors, was held entitled to recover the amount against the Company; though he must have known that the Company had no power to borrow money. [CROMPTON, J.—In this case there is a special statutory provision for borrowing under certain conditions. If an Act of Parliament prohibits borrowing, there would hardly be an equity in the lender to recover money lent.] In *White v. The Carmarthen, &c., Railway Company*, 38 L. J. Ch. 93, where a railway Company, after exhausting their statutory borrowing powers, issued bonds in the same form as the present, partly to a contractor and partly to persons who had supplied a parliamentary deposit, and at the time of the issue the Company were about to apply for powers to raise further share and loan capital, which application was successful, Wood, V. C., held, on demurrer to a bill against the Company, that these facts would not justify the Court in *declaring the bonds [*599 illegal as an evasion of the limitation of the Company's borrowing powers. There is no objection to the directors giving an acknowledgment of an equitable debt. [CROMPTON, J.—The term "acknowledge" in these bonds is not used with reference to an existing debt.] These bonds are not assignable; and are not in the form given in Schedule (D.) to stat. 8 & 9 Vict. c. 16: the obligees are not bound in a penal sum, therefore sect. 41, which requires that the consideration shall be truly stated, does not apply. If the directors had power to borrow this money, sect. 97 enables them to make a contract not under seal for the purpose. The assignee of these bonds never was a creditor of the Company; the original creditors had been paid by Barrow.

Lush and C. W. Wood, contra.—This was in effect a borrowing of money by the Company, either directly or indirectly, and is illegal either as being prohibited by statute, or being without consideration. Railway Companies, being the creatures of Acts of Parliament, have not the large powers which corporations created by Royal charter have at common law, but only those given by statute. They are required to satisfy the Legislature that they will be able to complete the undertaking with the funds which they are authorized to raise. And, reading together stats. 7 & 8 Vict. c. 85, and 8 & 9 Vict. c. 16, there is a prohibition of the borrowing of money except under the special Act, and the special Acts in this case, 23 & 24 Vict. c. clxxv., which gives a power to borrow on mortgage, impliedly excludes borrowing on any other security. Stat. 7 & 8 Vict. c. 85, intended to put down the practice of directors of Companies undertaking matters *beyond the scope of their special Act, as well as to restrain the borrowing of money. By sect. 17, [*600 if any railway Company acts in a manner unauthorized by the provisions of the Act or Acts of Parliament relating to such railway, or in excess of the powers given and objects defined by the said Act or Acts, the Lords of the Treasury are empowered to certify the same to the Attorney-General; and thereupon he shall proceed to obtain an injunction or order to restrain the Company from acting in such illegal manner, or for such other relief as the nature of the case may require. [BLACKBURN, J.—That section does not alter the law, it only empowers the Lords of the Treasury to put the Attorney-General in motion: it assumes that acts done in excess of the powers given by the Act relating to the railway may be restrained.] Sect. 19 assumes that loan notes are illegal; the

recital is a declaration by the Legislature that the borrowing of money where it is not authorized by the Act is illegal. [BLACKBURN, J.—It shows that the person who framed the clause thought it was illegal.] The recital applies to all instruments given as a security for money borrowed; the terms are not “purporting to be assignable,” but “purporting to give a security for the repayment of the principal sums borrowed;” and again, “such loan notes or other securities,” not those “purporting to be assignable,” but whatever their character. [CROMPTON, J.—Every instrument given as a security for money borrowed is assignable in equity.] And it was intended to prohibit the issuing of every such instrument. Moreover, the section having legalized those instruments which had been issued before the passing of the Act, proceeds to impose a penalty on any railway Company issuing any loan note or other negotiable or assignable *601] instrument purporting to bind the Company as a legal security for money advanced to the Company otherwise than under the provisions of some Act of Parliament authorizing the Company to raise such money and to issue such security. These bonds if lawfully issued are assignable at law. Sect. 46 of stat. 8 & 9 Vict. c. 16, makes every bond for securing money borrowed authorized by that Act assignable. [He also referred to sect. 20 of stat. 7 & 8 Vict. c. 85.] [BLACKBURN, J.—The form of these instruments does not show that they were given for money borrowed.] That may be shown by extrinsic evidence; and indeed must be assumed. The true consideration for these bonds, if stated, would have been that the plaintiff had incurred a liability for the Company which he was going to continue. At the time when the resolution for affixing the seal to these bonds was passed there was no debt due to the plaintiff. Suppose he had gone away with the bonds, the Company would have received no benefit from the transaction. [BLACKBURN, J.—Though the arrangement if not carried out would have been a fraud on the Company, after it has been carried out it may stand as against them. Suppose a covenant under seal and no consideration stated, what defence legal or equitable would the covenantor have? Do you say that all borrowing is prohibited?] Yes. [CROMPTON, J.—And that the Company must never overdraw their bankers? BLACKBURN, J.—Then, if they do overdraw, they must deposit debentures as a security. CROMPTON, J.—They may contract for things necessary for the undertaking, and so get credit. BLACKBURN, J.—That puts a railway Company in the position of a married woman who may bind the credit of her husband for necessaries, though not for a *602] loan of money to pay for them.] An infant is in the same position. [*L. Kelly* referred to *Marlow v. Pitfield*, 1 P. Wms. 558.] Stat. 7 & 8 Vict. c. 85, s. 19, taken in connection with the express enabling power in sect. 8 of stat. 23 & 24 Vict. c. clxxv., to borrow on mortgage, excludes every other mode of borrowing. The latter enactment, which enables the Company to raise an additional temporary capital by borrowing on mortgage, follows sect. 5, which limits the amount of the capital of the Company, and assumes that without it there would not be the power of borrowing. This power of borrowing on mortgage is inconsistent with the power to borrow on inferior securities at a higher rate of interest. [BLACKBURN, J.—There is a practical difference between a mortgagee and debenture holder under stat. 8 & 9 Vict. c. 16, and a common law creditor.] Also the provisions of

stat. 8 & 9 Vict. c. 16, show that the only power of borrowing is that given in the special Act. [He referred to sect. 40.] Sect. 45 requires that a register of the securities which are legalized shall be kept, in order that persons lending money to the Company may know how they stand; but there is no provision for registering these bonds, for they are not issued by virtue of the Act. And they are not within sect. 41, for no consideration is stated. In *Curteis v. The Anchor Insurance Company*, 2 H. & N. 537, which was an action on an annuity deed executed by three directors of a Joint Stock Company, the Court allowed the defendants to plead that the directors making the deed had no power to bind the Company because they had no authority to affix the seal to such a deed without being submitted to a general or special meeting of the shareholders in pursuance of stat. 7 & 8 *Vict. c. 110. In [*603 *Ernest v. Nicholls*, 6 H. L. Ca. 401, Lord Wensleydale said, p. 419, "All persons, therefore, must take notice of the deed and the provisions of the Act" 7 & 8 Vict. c. 110. "If they do not choose to acquaint themselves with the powers of the directors, it is their own fault, and if they give credit to any unauthorized persons they must be contented to look to them only, and not to the Company at large. The stipulations of the deed, which restrict and regulate their authority, are obligatory on those who deal with the Company; and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made, unless they are strictly complied with. The contract binds the person making it, but no one else." In *Lindley on Partnership*, vol. 1, p. 201, after citing this passage, it is said, "At the same time, the great principle that directors of a Company are rather special than general agents, and that, consequently, they have no power to bind the Company except within the limits set by its deed of settlement, is daily gaining ground, and may indeed be considered as the established doctrine, so far as regards Companies whose deeds of settlement are registered, and are therefore accessible to the public," citing *Balfour v. Ernest*, 5 C. B. N. S. 601 (E. C. L. R. vol. 94), and referring to, among other cases, *In re The Athenæum Life Assurance Society, Ex parte The Eagle Insurance Company*, 4 K. & J. 549; *The Official Manager of the Athenæum Life Assurance Society v. Pooley*, 1 Giff. 102. And in page 269 it is laid down as a principle, "That acts which are *ultra vires* do not bind the Company, whether they are actually known to be so or not."

Assuming that the Company may borrow, they can *do so [*604 only on certain conditions, one of which is the consent of a general meeting, and that has not been complied with. An unauthorized use of the common seal by the directors cannot give them a right against the Company: *The South Yorkshire Railway and River Dun Company v. The Great Northern Railway Company*, 9 Exch. 55, 84, per Parke, B. [BLACKBURN, J.—In *Payne v. The Mayor of Brecon*, 3 H. & N. 572, the Court proceeded on the replication, which showed that the money was borrowed for purposes authorized by a local Act; and therefore the Court did not decide that the plea was bad.] In *White v. The Carmarthen, &c., Railway Company*, 33 L. J. Ch. 93, the bonds were given to the contractors as security for money due to them from the Company, and Wood, V. C., on demurrer to a bill filed by a shareholder against the directors, held that the Court would not assume

that the issuing of such bonds was illegal or an evasion of the Company's Act. In Troup's Case, *The Electric Telegraph Company of Ireland*, 29 Beav. 353, and Hoare's Case, *In re the same Company*, 30 Id. 225, there was a borrowing by a private partnership whose deed of settlement gave no power to borrow, and there being no equity the Court would not interfere.

CROMPTON, J.—I am of opinion that this rule must be made absolute. The case is one of considerable importance, but it has been fully argued, and we have had an interval of time since the adjournment of the case for considering it. If I entertained any doubt, I should wish for further *605] time, but I do not entertain any, and it *is desirable that we should give our judgment speedily: if wrong, it can be set right on appeal.

I take the law to be correctly laid down by Parke, B., in *The South Yorkshire Railway and River Dun Company v. The Great Northern Railway Company*, 9 Exch. 55, 84, and indeed it was not much disputed. It is not necessary to decide on which party the onus lies of showing whether there was a power of borrowing or not, because the present case is within the rule of law there laid down. Parke, B., says that, generally speaking, all corporations are bound by their acts under the corporate seal properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed. He then proceeds:—"But where a corporation is created by Act of Parliament *for particular purposes*, with special powers, then indeed another question arises, their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*—that is, that the Legislature meant that such a deed should not be made." That doctrine applies to railway Companies, which are special bodies the creatures of Acts of Parliament, constituted for specific purposes, and the Legislature have, as respects them, put a limit on the powers belonging to corporations, and in particular on their powers of borrowing money. I think the directors of these Companies are in the position of special agents, having authority to affix the seal of the Company to deeds when not *ultra vires*, but have *606] no power to affix *the seal where the Legislature have declared, directly or by implication, that such deeds are not to be made. And the Company are not bound by the seal affixed by the directors to a deed, not merely where there is illegality in it, but where the directors have not authority to affix it. The power of a partner to bind the partnership is in the nature of that of an agent to bind his principal; and with some limitations such as the power of the directors of a Company to bind the Company. Though they have the custody of the seal of the Company, they have no right as agents to affix it to a deed which the Legislature have said shall not be made. I agree with Mr. Lush's argument, that the scope of the legislation on this subject is that the Company should not have power to increase their capital without the sanctions specified in their Act. We must therefore see whether the powers which belong to the Company as a corporation are limited by express or implied prohibition.

: Stat. 7 & 8 Vict. c. 85, s. 19, after reciting that many railway Com-

panies had borrowed money in a manner unauthorized by their Acts, &c., contains a prohibition against some modes of borrowing. If indeed they can borrow without a loan note the act would be valid. But it is monstrous to say that the borrowing of money upon the security of such a note is not impliedly illegal? The only doubt arises upon the words imposing the penalty—whether the penalty applies unless the instrument issued is negotiable or assignable; but the section goes on to provide that the Company may “renew any such loan note or other instrument,” issued prior to the passing of the Act; and the recital mentions, “such loan notes or other securities having been issued and received *in good faith as between the borrower and lender.” I think the penalty must attach to the loan notes mentioned in the [*607 first part of the clause, and therefore impliedly the Legislature prohibit any borrowing except in the manner authorized by the special Act.

By sect. 8 of the special Act the Company as soon as the whole capital shall have been subscribed, which has not yet been done, are authorized to borrow 185,000*l.* on mortgage of their undertaking. It is said that this leaves untouched the power of borrowing money on bond or by simple contract, so that though the Company can only borrow that sum on mortgage the Legislature have left to the Company a larger power of borrowing money on other security. But it is a strange construction that by an enactment giving them a limited express power of borrowing, they are to have a general implied power of borrowing. I agree with Mr. *Lush* that the more natural construction is that this is an enabling section, giving power to the Company which it would not otherwise have possessed, and that the directors cannot borrow money in any other way so as to bind the Company. And this construction is recognised in “The Companies Clauses Consolidation Act, 1845,” which by sect. 38 enacts, “If the Company be authorized by the special Act to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special Act, to borrow on mortgage or bond such sums of money as shall from time to time, by an order of a general meeting of the Company, be authorized to be borrowed, not exceeding in the whole the sum prescribed by the special Act, &c.,” which means that the special Act was required to enable the Company to borrow. The provision in *this section, coupled [*608 with the 19th section of stat. 7 & 8 Vict. c. 85, impliedly prevents the Company from borrowing money in any other way than on mortgage. Again, if they had a common law power to borrow money on bond or other security, the power conferred upon them by their special Act of borrowing on mortgage and under restrictions would be idle. Further, sect. 41 of stat. 8 & 9 Vict. c. 16, requires that in every mortgage and bond for securing money borrowed by the Company the consideration shall be truly stated, not merely on account of the stamp, because that is regulated by the amount of the sum borrowed; and sect. 45 requires that a register of mortgages and bonds shall be kept for inspection.

In *Payne v. The Mayor of Brecon*, 3 H. & N. 572, a special Act gave the corporation express power to borrow money for the purposes of the Act. In *White v. The Carmarthen, &c., Railway Company*, 33 L. J. Ch. 93, the bonds were given for a debt really due to the contractors for work done, and were valid, being proper instruments to be given in

that case. The bonds before us derive their name from a gentleman whom we all know to be a person of great ability; though not assignable at law they are in the nature of an account stated under seal, not for increasing the capital, but by way of payment of what is legally due. For they were intended to enable Companies to hand over to contractors to whom they were indebted for work executed under their contract something which was equivalent to money, and upon which money might be raised. It is the same as if the Company issuing them said to the contractors, "We are liable to you for work done under our *609] Act of Parliament, and our object *in giving you these bonds is to enable you to raise upon them the sums therein specified." Troup's Case, *The Electric Telegraph Company of Ireland*, 29 Beav. 358, as explained by Mr. *Kelly*, shows that when the money borrowed has been applied for the purposes of the Company the lender has an equity to follow and recover it, or at least a Court of equity will not assist the Company in resisting payment. But here the scheme of issuing these bonds was resorted to for the purpose of raising money upon them in order to enable the plaintiff to discharge the liability into which he had entered on behalf of the Company of which he was chairman. I am inclined to think that that transaction which was the origin of the whole, and which was in substance a loan, was illegal.

These bonds are therefore void as being without consideration, and also tainted with the illegality of the old transaction for which they were given as a fresh security; and further, as being a direct or indirect mode of borrowing money. It is clear that the plaintiff had knowledge of the purpose for which they were sealed, and he was a party to the resolutions by which the secretary of the Company was authorized to seal them. He took the bonds for the purpose stated, and applied them to that purpose; though whatever was done with them afterwards, the giving of them was for raising money in a way both expressly and impliedly prohibited by Act of Parliament, and therefore void, and the plaintiff cannot recover upon them.

As to the point whether the prohibition against borrowing extends to the overdrawing by the Company of the account at their bankers to a small extent for the *immediate necessities of the Company; I *610] think Mr. *Lush* gave the right answer,—that if a Company were permitted to overdraw to a small amount there is no reason why they should not do so to any extent to which their credit would reach.

BLACKBURN, J.—The principle of law was accurately stated by Lord Wensleydale in his judgment in *The South Yorkshire Railway and River Dun Company v. The Great Northern Railway Company*, 9 Exch. 55, 84, already cited. My opinion, in the present case, is based upon this, that the instruments, on which the action is brought, are instruments which by necessary inference the Legislature intended should not be made, and that this constitutes a good defence at law. If we had to decide whether it was a defence on equitable grounds, it would be necessary to consider what terms should be imposed, and we should have to refer to the decisions in the Courts of equity. But as there is a defence at law that question does not arise. If the plaintiff is dissatisfied with our decision he must go to a Court of equity.

This is the case of a railway Company created by a special Act of Parliament for particular purposes, and subject to a series of general

Acts; and when I look at the whole scheme of stat. 7 & 8 Vict. c. 85, and especially sect. 19, together with sect. 38 of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, and sect. 8 of the special Act, 23 & 24 Vict. c. clxxv., which prescribes the mode in which money is to be raised for the purposes of the undertaking, I come to the conclusion that it appears clearly by reasonable and necessary inference that the Legislature have restrained the power of the Company to *borrow money on mortgage or bonds except in the way authorized by the special Act. In the course of carrying on their business, a Company may be accommodated by their bankers with temporary small advances, which in pleading would be described as money lent; but the question whether such advances are legal does not arise in this case, because here was a complete borrowing by the Company. It was argued that sect. 19 of stat. 7 & 8 Vict. c. 85, attaches the penalty to the issuing of a loan note rather than to the issuing of such instruments as these; but the answer is, that it shows the object of the Legislature to have been that there should be no borrowing except in the mode specified, and a penalty being attached to the act of borrowing otherwise, it is void. These instruments are called "Lloyd's bonds," and do not profess to be issued under The Companies Clauses Consolidation Act, 1845, as securities for money borrowed, nor are they debentures such as are usually issued by Companies. No person taking them could say I have been misled. They are on their face the acknowledgment of a debt to some particular person, with a covenant to pay it. Such instruments may be useful in this way: when a Company are indebted, it may be convenient to make a bond pointing to a particular portion of the debt actually due; it would facilitate the assignment in equity of the debt thus acknowledged to be due, and possibly throw upon the Company the onus of showing the non-existence of the debt. But if there be no debt existing, such an instrument cannot create one, nor put the assignee in a better position than the original obligee or covenantee. And the person holding it could not recover upon it if it were shown that it was given gratuitously, or was *not authorized by statute. When we read the resolution of the 26th May, 1863, it is clear that these bonds were given as a security for money borrowed from the bankers of the Company; and according to the minutes in the books of the Company, the loan of 10,000*l.* was a loan to the Company. [*611]

I do not go into the questions as to the required amount of capital not having been raised, or the issuing of these bonds not being authorized by a general meeting: the money was not raised by means of a mortgage, which is the only way of raising money authorized by the special Act of this Company. The plaintiff had become security for a loan to the Company, by signing a joint promissory note. When the note became due the bank had a right to come upon him and the co-surety, but he could not have sued the Company for money paid to their use: he paid it to discharge a loan which was not contracted by the Company in compliance with the restrictions imposed by their Act. In pursuance of the resolution of the 26th May, 1863, to which the plaintiff was a party, the bonds were sealed and delivered to him. It does not matter what he did with them, but they were given that he might raise money upon the security of them. If the loan was not authorized, [*612]

and therefore void, the bonds given to facilitate the raising it are equally void.

My brother SHRE, who has gone to Chambers, requested me to say that, so far as he heard the argument, he agreed with our judgment.

Rule absolute.

***613] *DEUTERS v. TOWNSEND. June 7.**

Bill of exchange.—Holder.—Auter action pending.—Notice.

1. *Semble* that the position laid down in some books, that the holder of a bill of exchange who has brought an action on it, cannot transfer it to another endorsee for value so as to enable him to sue, if the endorsee had notice of the pendency of the former action, cannot be supported.

2. To an action on an overdue bill of exchange for 25*l.*, drawn by L. payable to himself or order three months after date, accepted by the defendant, and endorsed by L. to the plaintiff, the defendant pleaded that, before the commencement of the suit, A., being the holder of the bill, commenced an action against the defendant upon it, when it appeared, as the fact was, that L. had endorsed the bill, which action was still pending. The plea then averred the identity of the sums claimed in both actions, and that the plaintiff became the holder of the bill, and L. endorsed the same to him after it became due, without consideration and with notice of the pendency of the former action, and of the premises: held, that the plea was bad.

THIS was an action on an overdue bill of exchange for 25*l.*; drawn by E. L. Levy on the 1st May, 1863, payable to himself or order, three months after date, accepted by the defendant; and endorsed by Levy to the plaintiff.

Plea. That before the commencement of this suit one B. W. Aaron, being the holder of the bill of exchange, commenced an action against the defendant by issuing out of the Court of Queen's Bench, on the 6th August, 1863, a writ of summons under "The Summary Procedure on Bills of Exchange Act, 1855," for the recovery of the amount of the bill and expenses of noting, and which writ of summons was in the special form contained in the schedule to that Act annexed, and endorsed as therein mentioned; and by which endorsement B. W. A. claimed 25*l.* 1*s.* and interest due to him as the holder of the bill; and by which it appeared, and as the fact was, that E. L. L. had endorsed the same; and which writ was served upon the defendant, and which action and

***614]** writ were still pending and had never been determined or discontinued: and that the plaintiff afterwards, on the 24th of October, 1863, commenced his action under and by virtue of the provisions of "The Summary Procedure on Bills of Exchange Act, 1855," by issuing a writ of summons in the special form in Schedule A. to that Act annexed, and endorsed as therein mentioned, and by which endorsement the plaintiff claimed 25*l.* 5*s.* principal and interest due to him as the holder of a bill of exchange drawn by E. L. L. upon and accepted by the defendant, and endorsed by E. L. L., and also 2*s.* 6*d.* for noting, and 2*l.* 8*s.* for costs; and which last-mentioned writ of summons so endorsed was issued by E. L. L. as the attorney for the plaintiff, and was duly served upon the defendant, and that the last-mentioned writ was issued and prosecuted by the plaintiff for the recovery of the same identical principal sum of money for which B. W. A. issued his writ, and during the pendency thereof, and upon and in respect of the same identical bill of exchange, and upon and in respect of the same identical

consideration and no other: and that the plaintiff took the bill and became the holder thereof, and E. L. L. endorsed the same to the plaintiff after the same became due, without any consideration or value, and with notice and knowledge of the pendency of the first-mentioned action, and all the several matters in this plea mentioned.

Demurrer, and joinder.

Harington, in support of the demurrer.—The plaintiff, being a mere endorsee without value and without notice, stands in the position of Levy who endorsed to him, and the plea shows nothing to impeach Levy's title. [He *cited *Bosanquet v. Dudman*, 1 Stark. 1, 2, [*615 and *Watkins v. Maule*, 2 Jac. & W. 237.] [BLACKBURN, J.— [*615 In *Byles on Bills*, 159, 160, 8th ed., it is said:—"The holder cannot transfer after action brought, so as to give his transferee a right of action, provided the latter were aware that the action was commenced," for which is cited *Marsh v. Newell*, 1 Taunt. 109.] The authorities there cited do not bear out that position. [He was then stopped.]

R. A. Fisher, contra.—Every endorsement of a bill of exchange is *prima facie* for value: *Dabbs v. Humphrey*, 4 M. & Sc. 285; *Dod v. Edwards*, 2 Car. & P. 602 (E. C. L. R. vol. 12). In the passage cited from *Byles on Bills*, the author also refers to *Jones v. Lane*, 3 Y. & C. 281; where Alderson, B., says, p. 294, "In *Colombies v. Slim*, cited in Mr. Chitty's Book on Bills, the Court of King's Bench held that an endorsement after action brought on a note overdue, would nevertheless give the endorsee a right of action unless he had express notice of the action. Here the defendant had express notice of it, and I think an action would not lie, at the defendant's suit, on the bill. I should probably, however, had it been necessary, have allowed the defendant to have argued this question before the full Court." In *Chitty on Bills*, p. 157, 10th ed., we find, "Nor can a person who receives a bill with notice that an action has been commenced thereon and is still depending, maintain another action against the same party:" and he adds, in a note, "But it is otherwise where the endorser has not received such notice," *Colombies v. Slim*, 2 Chit. 637. The pendency of an action by an informer to recover a penalty is a bar *to a similar action by another [*616 informer. [CROMPTON, J.—That is on a different principle. The [*616 statutes give the penalty to the party who first sues for it.] When an overdue bill is endorsed it passes to the endorsee with all the equities between the original parties to that particular bill: *Story on Bills*, § 220, 4th ed.

Harington was not called on to reply.

COCKBURN, C. J.—Our judgment is for the plaintiff. It is difficult to see what are the facts intended to be stated in this plea. But I will assume they come to this—that Levy the drawer of the bill having endorsed it to Aaron, and Aaron having brought an action on it (which we must take to have been after the bill had become due and been dishonoured), Aaron transferred it by endorsement to the plaintiff. The point intended to be raised is, therefore, that the holder of a bill who has brought an action on it cannot transfer it to another endorsee for value so as to enable him to sue, if the endorsee had notice of the pendency of the former action. That is a proposition to which I am not prepared to assent. The holder of a bill is *prima facie* entitled to bring an action upon it, even though it was endorsed to him after it became due;

for the only consequence of that is, that whatever would have been a defence to an action on the bill in the hands of the transferor is equally so to one in the hands of the transferee. Here the transferor could not have brought two actions, and the two actions are not brought by him, for one is by the holder, who is entitled to bring it if the bill is not paid. The acceptor is liable on the bill, and might prevent a second action by *617] paying its amount. Suppose he does not, and an action is *brought by the second endorsee, what is his remedy? The answer is that two courses are open to him. He may pay the bill and plead a plea puis darrein continuance, although there might be inconvenience on the score of costs. But he has another very simple remedy. He may come to this Court for its intervention, because in justice and equity when the bill has been transferred to the second holder, the new action is equivalent to an abuse of its process, which the Court will not allow. That is a much simpler and better course than talking about equities. Try the present question by this test. It is perhaps consistent with this plea that Aaron having brought an action against the acceptor, had also had recourse to Levy, the drawer; for often the holder of a bill brings actions against every person whose name is upon it. Suppose he had done so here, could not Levy have brought his action on this bill when he got it back? Therefore, if Levy could have brought his action, I see no reason why the transferee after the first holder could not bring his action also. It is true that in *Jones v. Lane*, 3 Y. & C. 281, Alderson, B., p. 294, lays down a different rule, but he says it was not material to decide the point, and, if it were, he would wish a further argument upon it. Neither does the case of *Marsh v. Newell*, 1 Taunt. 109, referred to in *Byles on Bills*, p. 159, 8th ed., bear out the proposition.

CROMPTON, J.—This plea is bad, and does not raise the question which it probably intended to raise. The facts are quite consistent with this, that Levy may have been compelled to pay this bill, and so become *618] holder, and consequently entitled to sue, although the later *averments in the plea show that the plaintiff took the bill from Levy without consideration, and after it became due, and is therefore in no better position than he. I therefore think that the great question meant to be raised here does not arise. Here is an action by the holder of a bill, who afterwards transfers it; then the question is, can the transferee sue if he has notice of the pending action. It is not necessary to decide that point, but I am inclined to agree with the rest of the Court that the pendency of that action is matter for the equitable consideration of the Court, and not a matter pleadable in bar.

It appears clear from the authorities that the fact of a chose in action being in litigation does not make it not transferable. The defendant has two modes of relief. He might either plead autre action pending, or apply to the equitable jurisdiction of the Court to stay the proceedings. But by the bill having been passed in this way to another party to sue upon it, the plea of autre action pending would fail, because the new action applies to the new endorsement, and therefore one might think he might say, I will allow you to recover, and plead, as a plea puis darrein continuance, judgment recovered by another party. But by the new rules an inconvenience arises there, because to such a plea the plaintiff may say, I had a good cause of action at first.

On the whole, though there are some authorities in the books to the contrary, I think a plea such as I have suggested would not be pleadable in bar; and that, at all events, the plea in its present form is bad.

BLACKBURN, J.—I agree with the Lord Chief Justice *and my [*619 brother Crompton that this plea as pleaded is clearly bad, and that if it had been pleaded in the form they suggest, it would have been equally so. In taking the bill from Levy, the plaintiff has no better title than he, and the question therefore is, whether the facts in the plea would have prevented Levy maintaining the action. Those facts are, that Levy having drawn the bill, which must be taken to have been for value, Levy endorsed to Aaron, which we must also assume to have been for value, that Aaron accepted the bill, and after that Levy became holder (it does not appear how), but we must take it to have been in the only possible way, by Aaron coming on him and his taking back the bill from Aaron. Now the endorsee having sued the acceptor, can he be defeated by a plea alleging that a previous action had been commenced by Aaron? It is enough to state the proposition. How can the drawee be responsible for what the endorsee may have done? Besides which (although it is hardly worth citing an authority for) the point has been decided in *Callow v. Lawrence*, 3 M. & S. 95. But suppose the plea had stated what I imagine was intended, that Aaron, after he commenced the action, endorsed the bill for an oppressive purpose to another, still the plea would not be good. The holder of a bill may endorse it, and, if overdue, the endorsee takes it, with the equities upon it. But I never heard that an endorsee takes a *worse* title than the endorser. If Aaron had brought a second action, no more could be pleaded against him than can be pleaded against the original endorsee.

Then, Byles on Bills, p. 159, 8th ed., and Chitty on Bills, p. 157, 10th ed., are cited to show that if an *endorsee takes a bill with [*620 notice that an action is pending, it is a defence for the acceptor. If this means that that fact can be pleaded in bar against the maintenance of the second action, it is contrary to principle, and the authorities cited for it do not bear it out. In *Marsh v. Newell*, 1 Taunt. 109, the question was whether the Court could under those circumstances stay the action; which was entirely a matter for their equitable jurisdiction. In *Colombies v. Slim*, 2 Chit. 637, the Court decided that a plea of this sort was bad for want of an averment of notice of the bill being overdue. But they proceed to say that if there had been notice of endorsement, and the second action were brought to oppress the defendant, it would be otherwise. That very expression shows that that is not the substance of a plea in bar, for you could not introduce an averment that the action was brought with the view to oppress. But it is very good ground for an application to stay the proceedings on the first action. The only other authority is *Jones v. Lane*, 3 Y. & C. 281. All that amounts to is, that Alderson, B., threw out obiter there *might* be a difference in consequence of the endorsee having notice of the former action, but he expressly says that it was not necessary to decide upon it, and that he should like to hear further argument.

SHEE, J., concurring,

Judgment for the plaintiff.

***621] *The QUEEN v. The Local Board for MIDGLEY.**
June 4.

5 & 6 W. 4, c. 50.—Diverting and stopping up highways.—Certificate of justices.—Appeal.

1. Justices of the peace have no power under stat. 5 & 6 W. 4, c. 50, s. 85, to order a highway to be stopped up because, in consequence of matters to arise at some future time, another road not yet made *will be* "nearer or more commodious to the public."

2. On appeal to the Quarter Sessions against a certificate of justices ordering certain roads to be diverted and others to be stopped up, the Court may, under sect. 87, confirm the order as to the stopping up, and quash it as to the diverting.

ON appeal to the Quarter Sessions of the West Riding of Yorkshire, held at Leeds, in October, 1863, by the Local Board of the District of Midgley, against a certificate of two justices of the peace under stat. 5 & 6 W. 4, c. 50, dated 16th September, 1863, the facts certified having been tried by a jury, the Sessions quashed the certificate subject to the opinion of this Court.

The certificate was as follows:—"West Riding of Yorkshire, to wit. We, John Waterhouse and Evan Charles Southerland Walker, Esquires, two of Her Majesty's Justices of the Peace for the said West Riding of the county of York, acting within the west division of Morley, in the said Riding; having been applied to by the Local Board of the District of Midgley, in the said Riding and within the west division of Morley, acting as and executing exclusively of any other person the office of surveyor of highways within the limits of the said district, and having and exercising the powers and authorities, duties and liabilities of such
***622]** surveyor, and *all the powers, authorities, and discretion being vested in and exercisable by them within the said district formerly vested in and given to the inhabitants thereof in vestry assembled by the Act 5 & 6 W. 4, c. 50, and pursuant to a resolution in writing of the said Local Board in that behalf, to view part of a certain public highway, being a public bridleway and footway in the township of Midgley, within the said district of the Local Board of Midgley in the said Riding for the distance of 748 yards, which commences at or near to the Head House in the said township of Midgley within the said district, at a point where the said public highway, bridleway, and footpath joins a certain other public footpath or highway leading over an estate, called Arrowbuthe, in the said township, within the said district, past Shore End to and over the waste lands of the said township of Midgley, within the said district towards Lane Ends in the township of Wadsworth in the said parish of Halifax, and which first-mentioned part of a public highway, bridleway, and footpath thence continues and proceeds through certain woods or enclosures, called or known by the names of Lower Shore End Wood and Stoney Spots Wood, to the gate opening into the Clapper Hill Park, all in the said township of Midgley within the said district; and also to view a part of a certain public footpath or highway within the said township of Midgley and within the said district, in continuation of the lastly described highway, bridleway, and footpath, and which commences at the said gate, called Clapper Hill Park Gate, and extends for the distance of 784 yards through the said Clapper Hill
***623]** Park and through an enclosure called the *Horse Pasture, and terminates at Horse Pasture Gate, opening upon the said waste

land of the said township of Midgley and within the said district, in order that the said public highway and bridleway may be stopped up as unnecessary, and the same part of the same highway, so far as the same is a public footway, may, with the secondly described public footpath, be diverted and turned and afterwards stopped up; and also to view a proposed new public highway and footpath within the said township of Midgley and within the said district, and partly within the township of Warley, in the said parish of Halifax, beyond the said district, to be made in lieu and in stead of the said highways and footways hereinbefore described for the distance of 2105 yards, that is to say, as to that portion of the said proposed highway, situate within the said township of Warley, to commence at the gate leading from the public highway, called The Luddenden Dean Highroad, at Low, in the said township of Warley, to and past Low Cottage, thence to continue in a northerly, north-easterly, and north-westerly direction to and across the several closes or enclosures called [naming them], into Dean Head Occupation Road, thence along the said occupation road to the gap in the fence at the northerly corner of Dean Head Plantation, where the said gap opens upon Warley Moor, and thence across the said moor in a northerly direction to the centre of Luddenden Brook, in the said township of Warley, and as to the part of the proposed new highway and footpath for a distance of 85 yards from such last-mentioned point thence over the said brook and over the waste lands of the said township of Midgley, within the said *district to a point in the public highway and footpath leading from the Castle Carr to Nab, in the township of [*624 Haworth, in the parish of Bradford and county of York, 248 yards north of the bridge over Bare Clough Stream, in the said township of Midgley; and also to view a certain other public bridleway and footpath in continuance of the hereinbefore mentioned public highway, bridleway, and footpath in the said township of Midgley, and within the said district. for the said distance of 957 yards, in order that the same may be stopped up as unnecessary, which commences at the said gate, called Clapper Hill Park Gate, and continues and passes thence in westerly and southerly direction through certain enclosures, called or known as [naming them], to where the said last-mentioned highway, bridleway, and footpath ends at The Shore End Gate, opening upon the waste lands of the said township of Midgley, within the said district; and also to view a certain other highway and public footpath, in order that the same may be stopped up as unnecessary, which commences at a point 10 yards north from Head House Bridge, in the said township of Midgley, within the said district, upon the first hereinbefore mentioned highway, and proceeds thence in a north-westerly direction for a distance of 684 yards through certain woods and enclosures, called or known by the name of [naming them], to a point in the westerly fence of the said Shore End Pasture, 400 yards north from the said Shore End Gate, in the said township of Midgley, within the said district; and also to view a certain other highway and public footpath, in order that the same may be stopped up as unnecessary, which commences *at a point 45 yards north-east of the westerly corner of a cer- [*625 tain enclosure, called New-ta-en, in the said township of Midgley, and within the said district, and proceeds thence in an easterly and south-easterly direction for the distance of 1109 yards through the said

enclosure, called The New-ta-en Scout Wood, The Upper Ing, and Clapper Hill Park, and The Little Holme, to where the said highway and public footpath crosses The Luddenden Brook, in the said township of Midgley, within the said district: and upon being so applied to as aforesaid, having together viewed the said public highways, bridleways, and footpaths, as also the said proposed new highway and footpath, on the 18th August, A. D. 1863, at the request of the said Local Board as aforesaid for the purposes aforesaid, and with the consent in writing under the hands of Joseph Priestly Edwards, Esq., the owner of the lands through which the said new public highway and footpath is proposed to be made, as being nearer and more commodious to the public, may be had and used as a highway and footpath by the public. Now it having appeared to us upon such view as aforesaid that the said parts of the said first and secondly described public highways, so far as the same are footpaths, may be diverted and turned so as to make the same nearer and more commodious to the public and afterwards may be stopped up, and the said proposed new highway to be made through the said land of the said Joseph Priestly Edwards, with the consent of the said Joseph Priestly Edwards, as aforesaid, will be nearer and more commodious to the public than the said first and secondly described *626] highways. And further, that the said public highway first *above mentioned, so far as the same is a bridleway, and all and singular the remaining other public highways, bridleways and footpaths described as unnecessary may be stopped up, and having also directed the said Local Board to affix a notice in legible characters at the place and by the side of each end of the said highways from whence the same are respectively proposed to be turned, diverted, or stopped up, either entirely or subject as aforesaid, that an application would be made to Her Majesty's justices of the peace assembled at Quarter Sessions in and for the said West Riding, at Leeds, on the 20th October next, for an order for the stopping, diverting, and turning of the same public highways, and that the certificate of two justices, having viewed the same, with the plan of the same and of the proposed new highway and proof of the publication of the notices so required to be given, would be lodged with the clerk of the peace for the said West Riding on the 18th day of September then next, and having also directed the said Local Board to insert the same notice in the Halifax Guardian, being a newspaper generally circulated in the said West Riding, for four successive weeks after the said view so had by us as aforesaid, namely, &c., and having also directed the said Local Board to affix the like notice on the door of the church of the parish of Halifax, within which parish the said public highways lie, on Sunday, &c. And it now having been proved to the satisfaction of us, the said justices first above mentioned, by the evidence of [naming them], that the said several notices had been so affixed and published as required as aforesaid, and *627] a plan having been delivered to us at the same time of *such proof so made, which said plan particularly describes the said old public highway and the said proposed new highway by their metes, bounds, and admeasurements thereof respectively, and which said plan has also been verified by a competent surveyor in that behalf; We, the said John Waterhouse and Evan Charles Southerland Walker, Esquires, being the said justices first above mentioned, whose hands are hereunto

subscribed, do hereby certify that we have viewed in manner aforesaid the said public highways and footpaths proposed to be diverted and turned, and the said proposed new highway and footpath so to be made as aforesaid in manner as hereinbefore mentioned, and that all the several premises as aforesaid have been had, done, and performed, and have been proved to our satisfaction, and that the said proposed new highway and footpath will be nearer by 165 feet, and be more commodious by reason of its being more direct and less circuitous than the said highway and footpaths hereinbefore intended to be diverted and turned when the diversion thereof has been made under the provisions of The Halifax Park and Improvement Act, 1858, upon the construction of the Upper Dean Head Reservoir, and that the said several highways, bridleways and footpaths so proposed to be stopped up are unnecessary, because of their being longer than and in close proximity to a public highway and bridleway and footpaths leading from Lane Ends and Peckett Well, in Wadsworth aforesaid, to Low Bridge, in the said township of Midgley, which are nearer and more convenient than the said highways, bridleways and footpaths so proposed to be stopped up as aforesaid; and lastly, that the said several highways so proposed *to be stopped up or diverted are so connected together that [*628 they cannot be separately stopped up or diverted and dealt with without interfering one with the other, and may be lawfully included, stopped up and diverted in and by one order and certificate. As witness, &c.

On the hearing of the appeal, it was objected by the appellants; first, that that part of the certificate wherein the justices certify that the "proposed new highway and footpath will be nearer by 165 feet, and be more commodious by reason of its being more direct and less circuitous than the said highway and footpaths hereinbefore intended to be diverted and turned when the diversion thereof has been made under the provisions of The Halifax Park and Improvement Act, 1858, upon the construction of the Upper Dean Head Reservoir," was not authorized by the 85th section of The General Highway Act, which empowers the justices on view to certify that a public highway may be diverted and turned so as to make the same nearer or more commodious to the public; and, secondly, that inasmuch as the appeal was against the whole of the certificate, and that the certificate was for diverting more highways than one, under section 86 of The General Highway Act, the Quarter Sessions could, upon the application of the respondents in this appeal, only decide against and quash the whole certificate, and could not lawfully under sect. 87 of that Act decide upon the propriety of confirming any part or parts of the certificate without prejudice to the remaining part or parts thereof.

The respondents contended; first, that the Quarter Sessions ought to confirm the whole certificate, inasmuch as the part objected to first was authorized by the 85th *section; and secondly, that if that part [*629 was not so authorized, yet under the 87th section the Quarter Sessions could lawfully decide upon the propriety of confirming such parts of the certificate as related to the other roads certified therein to be unnecessary without prejudice to the part objected to first as aforesaid; and moved the Court to confirm the certificate, either wholly or as to such parts as related to the roads certified as unnecessary.

The Quarter Sessions decided in favour of the appellants on both objections, and refused the respondents' motion; and thereupon the respondents applied to have the matters of fact then determined by a jury pursuant to the provisions of sect. 89 of the General Highway Act; but this application the appellants opposed: and the Court thereupon, without hearing any evidence or submitting any question of fact, discharged the jury and ordered the certificate to be quashed, subject to a case for the opinion of this Court on each of the points. If the part of the certificate which certified for the diverting and turning the road so first objected to by the appellants was not authorized by sect. 87 of the Highway Act, and the Quarter Sessions could not have lawfully decided upon the propriety of confirming any part of the certificate, then the decision and order of the Quarter Sessions was to stand; but if the part of certificate for the diverting and turning the road so first objected to was authorized by sect. 85, then the certificate was to be confirmed and enrolled accordingly; or if the part of the certificate as to the diverting and turning the road was not authorized by the 85th section, but the Quarter Sessions could have legally decided upon the propriety of confirming any part of the certificate under the 87th section, then their decision *on the appellants' second objection was
*630] to be reversed, and the certificate was to be confirmed as to the roads therein certified to be unnecessary, and to be enrolled in respect of such roads and parts relating thereto accordingly.

T. Campbell Foster and Waddy, for the appellants.

Maule, West and Forbes, contra.

The whole case appears in the judgment. *Rex v. Ridgway*, 5 B. & A. 527 (E. C. L. R. vol. 7), was referred to by the appellants' counsel.

BLACKBURN, J.—In answer to the questions put to us, we are of opinion that the part of the certificate of the justices which relates to diverting and turning the road, is not authorized by the statute, but that the Quarter Sessions had power legally to decide upon the propriety of confirming any part of the residue. So much of the order of the Quarter Sessions as affects that part of the certificate which relates to diverting and turning the roads is to be confirmed, but it is otherwise with respect to that portion which relates to the stopping up the roads.

The case is difficult to comprehend, but may be understood thus, that here were several roads and bridleways, some of which were proposed to be diverted and others substituted for them, and some to be stopped up as unnecessary. The justices certify that the "proposed new highway and footpath will be nearer by 165 feet, and be more commodious by reason of its being more direct and less circuitous than the said
*631] highway *and footpaths hereinbefore intended to be diverted and turned when the diversion thereof has been made under the provisions of The Halifax Park and Improvement Act, 1858, upon the construction of the Upper Dean Head Reservoir." As far as it goes it appears that the road which they intended to substitute was not shorter or more convenient than the existing road, but the question is whether it is sufficient for the justices to certify that the existing road shall be altered in a manner which, probably, will have that effect.

It would have been more reasonable, perhaps, if under these circumstances the parties had not objected to this certificate, but they have done so, and we must, therefore, see how the law stands.

Sect. 85 of stat. 5 & 6 W. 4, c. 50, "to consolidate and amend the laws relating to highways," says that the justices shall certify "that the proposed new highway is nearer or more commodious to the public; and if nearer, the said certificate shall state the number of yards or feet it is nearer, or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary." All that points to the present tense, and not to what the justices might reasonably expect would take place afterwards. Therefore the certificate as to diverting and turning these highways assigns a bad reason, and the Quarter Sessions decided rightly that the justices had no power to make a certificate for that purpose.

But then we come to the parts of the roads directed to be stopped up. The section I have read says, if a highway is to be stopped up as unnecessary the *certificate of the justices shall state the reason why it is so. The certificate before us relates to several high- [*632 ways, bridleways and footpaths, which it describes as "unnecessary, because of their being longer than and in close proximity to a public highway and bridleway and footpaths leading from, &c., to, &c., which are nearer and more convenient than the said highways, bridleways and footpaths so proposed to be stopped up." These are separate and different roads from those proposed to be diverted. The certificate says, we propose to stop them up because it is more convenient that that should be done. If that is so in fact, there was good reason for doing it.

Before the Highway Act, 5 & 6 W. 4, c. 50, people were bound to deal with each highway as a separate thing. But sect. 86 of that Act says, "Provided always, and be it further enacted, that in any case where it is proposed to stop up or divert more than one highway, which highways shall be deemed to be so connected together as that they cannot be separately stopped or diverted without interfering one with the other, it shall be lawful to include such different highways in one order or certificate." The justices here assert, that "the said several highways so proposed to be stopped up or diverted are so connected together that they cannot be separately stopped up or diverted and dealt with without interfering one with the other," and thence they come to the lawful conclusion that they "may be lawfully included, stopped up and diverted in and by one order and certificate."

Then sect. 87 says, "Provided also, and be it further enacted, that in the event of any appeal being brought against the whole or any part or parts of any order or *certificate for diverting more highways [*633 than one, it shall be lawful for the Court to decide upon the propriety of confirming the whole or any part or parts of such order or certificate without prejudice to the remaining part or parts thereof." The words of this section are not at all selected so as to show that the penman had a ready command of language. He talks of the Quarter Sessions having power to "confirm" part of the order without prejudice to the rest, when it is clear he meant to say "quash." And in the earlier part of the section, where he says, "in the event of any appeal being brought against an order for diverting," he has dropped the word "stopping;" and the whole section looks much as if it had been inserted when the bill on which the Act is founded was in committee. Then, instead of saying "provided *always*," he says, "provided *also*:" that

however will not affect the construction. But if any reason could be suggested why there might be a power of a partial appeal against an order for the diversion of a highway, but not against an order for stopping one, perhaps it would be said the Legislature meant the difference. And although there were no apparent reason for that, still, as the Legislature did change the language, they must be supposed to have had some object in so doing. But, although that is a good rule for construing Acts of Parliament in general, still in this case the language may mean that, in the case of an appeal being brought against the whole or any part or parts of any order or certificate for diverting, and turning and stopping any highway or highways, in short to any order or certificate under the Act, the Court may confirm a part and quash the rest. If *634] that is the proper construction, the rest is plain enough, and *the Quarter Sessions can decide on the propriety of any part of this certificate, and confirming the whole or any part of this order. It may be that striking out one part of the certificate may render it proper to confirm the rest; and the Quarter Sessions might therefore have gone on and taken the opinion of the jury on the facts. But the appellants' counsel objected to that, and the Quarter Sessions yielded, and we must take it now, with the cognisance and consent of all parties present. We must take it they meant to say, we will withdraw the case from the jury, and reserve a case for this Court on the points of law as if the jury had found a verdict. I see nothing illegal, improper, or unreasonable in that. Then it is objected that the jury were bound to find a verdict on the case before them; but it would make no difference, except as to the costs of the appeal, whether a verdict is found by the jury or the appeal is dismissed by the Court. It was therefore competent for the appellants to waive taking the actual verdict.

SHEE, J. (the only other Judge present), concurred.

Order of Sessions confirmed as to stopping up road.

*635] *LATHAM and Others v. The QUEEN. June 4.

Indictment.—Several counts.—Imperfect finding.—Jurisdiction of Quarter Sessions.—Conspiracy.—False pretences.—7 & 8 G. 4, c. 29, s. 53.

1. Where an indictment contains several counts, it is not ground of error that no verdict has been given on some of them, provided a verdict has been found on one good count, and judgment given generally.

2. An indictment at Quarter Sessions alleged that the defendants, contriving and intending to defraud R. B. of his money, unlawfully, knowingly, and designedly did amongst themselves combine, conspire, confederate and agree together by divers false pretences against the form of the statute in that case made and provided, the said R. B. of his moneys to defraud, against the form of the statute: held, that the Quarter Sessions had jurisdiction to try this.

WRIT of error from the Quarter Sessions of the County Palatine of Lancaster.

The indictment was as follows. First count. The jurors for our lady the Queen upon their oaths present that heretofore, before and at the time of the committing of the offences hereinafter stated, Richard Bealey carried on the business of a bleacher and manufacturing chemist, to wit, at Radcliffe, in the county of Lancaster, and during all the time aforesaid Benjamin Latham, Edward Hacking, Henry Ball, Hiram

Hardman, Peter Pendlebury, John Mills, John Wild and Edmund Taylor were servants in the employment of the said Richard Bealey, at his works, to wit, at Radcliffe aforesaid, and were during all the time aforesaid employed by the said Richard Bealey in making and manufacturing a certain product, to wit, salt cake, and in the making and manufacturing of the same it became and was necessary divers large quantities of salt to use, consume, roast and boil, and that the wages paid by the said Richard Bealey to the said Benjamin Latham, &c., were paid and calculated upon the number of charges of salt supplied by the said Benjamin Latham, &c., to *each of the furnaces at which the said Benjamin Latham, &c., were respectively employed, and that [*636 the said Benjamin Latham, &c., being evil disposed persons, and intending to cheat and defraud the said Richard Bealey of his money, unlawfully, knowingly, and designedly, did falsely pretend to the said Richard Bealey that they had used at the furnaces of the said Richard Bealey divers charges of salt of the weight of 700 lbs. each charge, by means of which said false pretence the said Benjamin Latham, &c., did then unlawfully obtain from the said Richard Bealey 130*l.* in money as and for wages, of the money of the said Richard Bealey, with intent thereby then to defraud, whereas in truth and in fact the said Benjamin Latham, &c., had not then used at the furnaces of the said Richard Bealey charges of salt of the weight of 700 lbs. each charge, as they and each of them then, to wit, at the time they did so falsely pretend, well knew; to the great damage and deception of the said Richard Bealey, to the evil example, &c., against the form of the statute, &c., and against the peace, &c.

Second count. And the jurors aforesaid, &c., that the said Benjamin Latham, &c., being evil disposed persons, and contriving and intending to defraud the said Richard Bealey of his money, unlawfully, knowingly, and designedly, did amongst themselves combine, conspire, confederate, and agree together by divers false pretences, against the form of the statute in that case made and provided, the said Richard Bealey of his moneys to defraud, against the form of the statute, &c., and against the peace, &c.

Plea. Not guilty.

The jury acquitted Edmund Taylor generally, and convicted the other defendants on the second count: **"Whereupon,"* proceeded the record, "it is considered and adjudged by the Court [*637 here that the said Benjamin Latham, &c., be remanded into the custody of the governor of the house of correction at Salford aforesaid and be kept in safe custody and to hard labour for the term of two calendar months each."

The following errors, among others, were assigned.

First. That, although the jury were sworn to try the issues joined on both counts of the indictment, the verdict was only given on the issue joined on the second count.

Second. That the second count, on which the defendants were found guilty, did not contain any offence in law.

Third. That the second count, on which the defendants were found guilty, did not contain any offence which the Court of Quarter Sessions had jurisdiction to determine.

Joinder in error.

Cottingham, for the plaintiffs in error.—First. At the trial of this indictment, the prisoners were in jeopardy on the whole, and if they were convicted and punished upon it, they could not plead *autrefois* acquit to a second indictment for any part of it. In *O'Connell v. The Queen*, 11 Cl. & F. 155, Parke, B., in answering the questions put by the House of Lords, says, p. 295–7, “I should say, that where an indictment contains several counts, each ought to be brought to its proper legal termination by a proper judgment. The practice has grown up, and much increased in modern times, of introducing many counts into one indictment; and though we know practically that these are most frequently descriptions, only in different words, of the same offence, *638] they are allowable *only on the presumption that they are different offences, and every count so imports on the face of the record, as Mr. Justice Buller states in *Rex v. Young*, 3 T. R. 98, 106. * * * The question then being how these counts are to be dealt with on the face of the record, I should have said, *à priori*, that it was the duty of the Court acting between the Crown and the accused, and the right of the accused, to have the charge of each offence (for as such I must treat it) properly and finally disposed of on the record, so that the accused as well as the Crown might know for what offence the punishment was inflicted, and for what not; and so that the accused might plead his conviction in bar of another indictment for the offence for which he was punished, and that the Crown might also know that it might again prosecute for that offence for which he was not. * * * In short, I should have said that the defendants should on the face of the record be put precisely in the same condition as if the several counts had formed the subject of several indictments.” [BLACKBURN, J.—That authority does not bear you out. Why is not a man to be punished for crime A. because there is an imperfect record as to crime B., with which he is also charged?] Even the discharge of the jury by the Judge on a former trial gives no right to the accused to plead *autrefois* acquit to a fresh indictment for the same offence: *Reg. v. Charlesworth*, 1 B. & S. 460 (E. C. L. R. vol. 101). The law is thus laid down in 1 Stark. Cr. Pl., p. 346, 2d ed., “It has been adjudged that the verdict, in case of a partial acquittal, should extend to the whole of the charge, so as to leave no part upon which the defendant has not been either convicted or acquitted. * * * p. 347. And where several offences are *639] charged in the indictment, and upon a general *plea of not guilty the jury find the facts specially, and leave the question of guilt or innocence for the opinion of the Court upon those facts, the verdict will be sufficient, though from those facts it appears that the defendant was guilty of one only of the offences charged,” for which *Rex v. Hayes*, 2 Ld. Raym. 1518, is cited. [SHEE, J.—Do you contend that whenever counsel for the prosecution is put to elect on which count he will proceed, there must be a verdict on each count?] Yes. Or a *nolle prosequi* as to some. [SHEE, J.—In *Reg. v. Jones*, 2 Moo. C. C. 94, it was held that where counts for felony and misdemeanour were improperly joined in an indictment, a verdict might be taken on the count for felony, and the count for misdemeanour disregarded.]

Secondly. The Quarter Sessions have no jurisdiction on the second count, on which alone the verdict was pronounced. They have no jurisdiction to try conspiracy generally, and can only do so when the con-

spiracy is to commit an offence which the Sessions would have power to try if committed by one person, stat. 5 & 6 Vict. c. 38, s. 1; which the preamble of cap. 43 speaks of as a restraining enactment. The gist of the offence described in stat. 7 & 8 G. 4, c. 29, s. 58, is the *obtaining* the property of another by means of a false pretence, *Reg. v. Jones*, 1 Den. C. C. 551, *Reg. v. Garrett*, 1 Dears. C. C. 232, and a conspiracy to obtain money by false pretences could therefore be tried by the Sessions. But the offence described in this count is conspiring to defraud, a matter over which the Sessions have no jurisdiction. Neither does the count set out the false pretences used.

T. Campbell Foster, contra (having been directed by *the Court to confine himself to the first point). It is enough that [*640 there be one good count in an indictment and a lawful judgment awarded upon it: *Peake v. Oldham*, in error, Cowp. 275, 276, per *Ld. Mansfield*; *Holloway v. The Queen*, 2 Den. C. C. 287. [BLACKBURN, J.—That is where one count is good and the others bad. But here the complaint is that a complete verdict on all the counts has not been given.] In *O'Connell v. The Queen*, 11 Cl. & F. 155, the tenth question put by the House of Lords to the Judges was, p. 232, "Is there any sufficient ground for reversing the judgment by reason of its not containing any entry as to the verdicts of acquittal?" In answer to this, *Tindal, C. J.*, says, p. 255, "After causing search to be made in the Crown Office, no instance can be found of such an entry, where the party is found guilty of any part of the indictment on which he receives judgment; and we think such practice is in conformity with the law." The third question was, p. 231, "Is there any sufficient ground for reversing the judgment, by reason of any defect in the indictment, or of the findings, or entering of the findings, of the jury upon the said indictment." In answer to which, *Tindal, C. J.*, says, p. 238, "I conceive it to be the law, that in the case of an indictment, if there be one good count in an indictment, upon which the defendants have been declared guilty by proper findings on the record, and a judgment given for the Crown, imposing a sentence authorized by law to be awarded in respect of the particular offence, such judgment cannot be reversed by a writ of error, by reason of one or more of the counts in the indictment being bad in point of law." [He cited *Gregory v. The Queen*, in error, 15 Q. B. 957 (E. C. L. R. vol. 69).] There being no entry on the *first count, it must be presumed that the defendants were [*641 acquitted upon that count. If there be error here in the mode of entering the verdict, the defendants can at any time have it amended by application to the officer of the Court below.

Cottingham replied.

BLACKBURN, J.—Our judgment must be for the Crown. The first objection taken to this record is that here are two counts, to try both of which the jury were sworn, and unquestionably they ought to have given a verdict on both. I have very little doubt that *in fact* they found a verdict of acquittal on the first count, and of guilty on the second, and the verdict being entered in its present form is a misprision of the clerk. If in due time application had been made to the Court below to amend the record, and there was anything to amend by, as there probably was, the mischief would have been set right; and if the prisoners are likely to suffer any inconvenience from a verdict of not

guilty not being entered on the first count, it might be amended now. But we cannot speculate on that, and must take the case as if the jury were silent on the first count; and the question is, does that vitiate the proceedings?

When an issue is left to a jury to try, they must dispose of the whole of it, and if they neglect to do this, and leave it imperfectly disposed of, there must be a venire de novo if the case be one of misdemeanor; if one of felony, it is a question not yet finally determined whether a venire de novo should be awarded, or the above omission on the part of the jury is a fatal objection frustrating the ends of justice. We *642] need not, however, go into that question, for where an indictment consists of several counts, they are to all intents and purposes several indictments, and the same as if separate juries were trying them. Although a finding being imperfect or defective in itself might justify a venire de novo, why should that affect a good count, and save prisoners who have been convicted upon it, from punishment because another charge on the record has not been disposed of? On principle there is nothing to show that it should do so.

Then it is said we are concluded by authority. There is only one case which has the least bearing on the question, namely, *Rex v. Hayes*, 2 *Ld. Raym.* 1518. In that case the indictment contained three counts, and a special verdict was returned, finding the prisoners guilty on two of them, but said nothing on the third, and the question was whether judgment could be given against them as guilty on the whole. The Court held, that as the jury had virtually found, and the facts showed, the prisoners not guilty on the third count, the record established that they were guilty on two counts, and not on the third. The counsel who argued that case for the defendants referred to authorities to show that where a verdict finds but a portion of an issue, or only one of several issues, it is bad and ground for a venire de novo; but the Court did not determine that point at all,—there was no occasion to decide that no verdict being given on one count vitiates a verdict on another count which is good. In civil cases there is only one process against the defendant, and therefore if a new trial is granted on one part of the case it is granted on the whole. But in a criminal case, *643] where each count is as it were a separate indictment, one count not having been disposed of no more affects the proceedings with error than if there were two indictments. In *O'Connell v. The Queen*, 11 *Cl. & F.* 155, which has been referred to, Parke, B., says, p. 296-7, "So in respect of those counts on which the jury have acted incorrectly, by finding persons guilty of two offences (on a count charging only one), if the Crown did not obviate the objection, by entering a nolle prosequi as to one of the offences, *Rex v. Hempstead*, R. & R. C. C. 344, and so in effect removing that from the indictment, the Court ought to have granted a venire de novo on those counts, in order to have a proper finding; and then upon the good counts it should have proceeded to pronounce the proper judgment. In short, I should have said that the defendants should on the face of the record be put precisely in the same condition as if the several counts had formed the subject of several indictments." That is exactly what I say here. Each count is in fact and theory a separate indictment, and no authority has been produced

to show that we ought to defeat the ends of justice by such a technical error as this.

As to the second question. The second count of this indictment, on which the defendants have been convicted, is for a conspiracy, charging that they, being evil disposed persons, and contriving and intending to defraud Richard Bealey of his money, unlawfully, knowingly, and designedly did amongst themselves combine, conspire, confederate and agree together by divers false pretences, against the form of the statute in that case made and provided, the said Richard Bealey of his moneys to defraud, against the form of the statute, &c. The object of the conspiracy is to defraud, contrary to the *form of the statute. It is argued that, as the Quarter Sessions cannot try a conspiracy [*644 unless it is a conspiracy to commit an offence which, if committed by one person, they could try; although the Quarter Sessions can try what we may call shortly "swindling," i. e., obtaining money by false pretences with intent to defraud, and attempts to do so; that that is not the offence charged here, because it is not stated that the conspiracy was to obtain money, but to defraud. We do not however, when looking at a charge of *conspiracy* to commit an offence, require it to be set forth with all the precision requisite in describing the offence itself; it is enough to show that the conspiracy is to commit an offence that could be tried at Quarter Sessions. Here therefore, before the jury could convict of this conspiracy, they must be satisfied that the parties had conspired to defraud by false pretences and against the statute, and if that was the object of the conspiracy it was an offence over which the Quarter Sessions had jurisdiction. As to the false pretences not being set out in the indictment, it has frequently been decided that this is not necessary. *Sydserrf v. The Queen*, in error, 11 Q. B. 245, may be taken as an example.

SHEE, J. (the only other Judge present), concurred.

Judgment for the Crown.

*In re TIVNAN and Others. May 25. [*645

International law.—Extradition.—Jurisdiction.—Piracy.—Belligerent Act.—6 & 7 Vict. c. 76.—Warrant of justice.

1. Stat. 6 & 7 Vict. c. 76, s. 1, enacts, that in case requisition shall be made by the authority of the United States of America, in pursuance of a treaty between them and this country of the 9th August, 1842, for the delivery up of any person charged with certain crimes therein specified, among which is "piracy," committed within the jurisdiction of the United States, who shall be found within the territories of her Majesty, such person may be apprehended and delivered up to justice: Held, by Crompton, Blackburn and Shee, JJ., dissentiente Cockburn, C. J., that "piracy" here must not be understood in the sense of piracy by the law of nations, but of acts made piracy by the municipal law of the United States.

2. In order to enable a justice of the peace to issue his warrant under this statute for the apprehension and committal for trial of an accused person, it need not appear that there was an original warrant for his apprehension in the United States, or depositions taken against him there.

3. The warrant of such justice of the peace need not allege that the evidence before him was taken upon oath.

4. Concessum. In time of peace any act of depredation on a ship is *prima facie* an act of piracy: but in time of war between two countries the presumption is that depredation by one of them on a ship of the other is an act of legitimate warfare. It is immaterial whether the act was done by soldiers or volunteers, and whether it was commanded by the belligerent state, or when done ratified by it.

EDWARD JAMES, in Easter Term, April 25th, moved for a writ of habeas corpus ad subjiciendum to bring up the bodies of Patrick Tivnan and two others, detained in the Main Bridewell in the borough of Liverpool.

On the 9th May, *Lush* and *Milward* showed cause, and *Edward James*, *Littler* and *T. H. James* appeared to support the rule.

THE COURT (consisting of COCKBURN, C. J., BLACKBURN, MELLOR and SHEE, JJ.), however, said it was unnecessary to hear the latter, as the matter in question was of such great importance that it would be better to have the facts before them in an official form.

Rule absolute.

*646] *In the present Term, on the 24th May, the prisoners were brought up accordingly, and the return read. The case was argued on that day and the next, on the latter of which judgment was given.

The return of the keeper of the Bridewell stated that he kept the prisoners by virtue of certain warrants from T. S. Raffles, Esq., stipendiary magistrate of the borough of Liverpool. The first of these, dated 23d February, 1864, reciting that Sir George Grey, Bart., one of Her Majesty's principal Secretaries of State, by warrant dated the 20th February, 1864, signified to the magistrate that a demand had been made by the government of the United States of America to deliver the now prisoners up to justice, charged with piracy on the high seas within the jurisdiction of the United States, directed the constables to arrest and bring them before him to answer the charge. On this the prisoners were arrested, and remanded several times, but no judgment had been pronounced on their case by the magistrate.

It was agreed that the evidence adduced before the magistrate and the warrant of the Secretary of State should be considered as in Court.

Copy of the depositions taken in the matter of Patrick Tivnan, otherwise James Ferran, otherwise John Clements; Patrick Murray, otherwise George Kelly, otherwise George McMurdoch; John Quincey Sears, otherwise Warren Quincey.

James Nicholas on oath says:—I am Captain of the American schooner *Joseph E. Gerity*, belonging to New York. I was at Matamoras in November last with the schooner. I remember on the 16th November last some passengers coming on board at 12 o'clock at noon.

*647] They had engaged their passage on shore. *We were bound for New York with a cargo of cotton. We sailed at half-past three o'clock on the same day. On the night of the 17th November last, I went to bed at eight o'clock. I went below to try to sleep, but could not. I came on deck about eleven o'clock, and did not go to bed after that. At half-past eleven o'clock we hauled her flying-jib down. The six passengers were on deck then, including the three prisoners. At twelve o'clock at night the watch was relieved, and went below. I sent one George Sweeney up aloft. He was up a long time. About half-past twelve o'clock I went into the lee-gangway to keep a look out. When I got there, a person named Brown took hold of me. The three prisoners were on the other side then. I struggled with Brown to free myself, and then the prisoners Wilson and Kelly and one O'Brien (not here) took hold of me, each pointing a revolver to my head, saying, "If you shout, you will be a dead man." They put me into the fore-

castle, and put a sentry there, and told me if I made an attempt to go out they would shoot me. It was Brown who said this. It was Kelly that kept sentry first. The next thing was that the man that was up aloft was brought down, wounded on the hand by O'Brien, Kelly and Wilson. He was left with me. After that I heard a shot fired, and then they brought the mate to me. They all brought him, except Brown and Hogg. Kelly and Wilson were amongst them. The mate was placed with me and the other man. It would be about a quarter to one. It all happened in about half an hour. In two or three days afterwards I had a conversation with Clements. He said that I might be glad that I did not fall into other hands. If I had fallen into the hands of others at Matamoras, who were *waiting for the same chance, they would have killed me. Wilson was managing the ship during the time. [*648 Hogg and Brown, and then Wilson navigated the ship. I was allowed to walk the deck occasionally by them. I was kept in confinement until the 25th November. I should have said that on the morning of the 18th November they called me aft to get breakfast. I asked the steward for a cup of coffee. Hogg told me that he had proper documents to justify the act he had done. The prisoners heard him say that. I asked him for them, but he did not show them to me. They never showed me any authority at all.

On the 25th November they called me aft about twelve o'clock, and told me there was a boat ready, and I was to go away in her. Before putting me into the boat, I was brought before Hogg and Brown. Neither of the prisoners were present then but Wilson. Hogg demanded a paper signed by the American Consul, that our cargo was American cotton, to show any cruisers they might fall in with. I told them I had no such paper. He told me, if I deceived him he would put ten or eleven shackles of chain round my neck and throw me overboard. Wilson heard Hogg say this. I had not the paper they wanted. They had possession of all the ship's papers.

We were put into the boat, close to Cape Catuchee. I asked them for a chart and a compass, but it was refused. It was Hogg that refused. The prisoners were three or four feet off then. I spoke loud enough for them to hear me. I was sent adrift and put about for seven days. They gave us provisions for three days. We landed on the coast of Yucatan. I have not seen the vessel since.

*The large box produced is mine. It was on board the schooner when I left her. The small chart produced and the [*649 sextant and the case and the book produced are mine. Also the log slate produced. They were on board the vessel when I left her.

By Mr. Cobb.—I am quite sure they are all my property. When I was taken to the fore-castle it was by Brown, Wilson, Kelly and O'Brien. I know Kelly kept sentry, because I could hear his voice. I am sure the prisoner Tevana is the same person as Clements, and that it was he that said I should be thankful I had not fallen into other hands. I was on deck at one time for about three or three and a half hours at longest after this occurrence. I was only let out every other day. Wilson was navigating the ship then. I heard Wilson give the orders to the crew. We had six of a crew and six passengers. I have heard that Mr. Hogg was a major in the Confederate army. I believe from his appearance that he was. I do not know who paid the passage for the prisoners. I

received no money. Major Hogg was the leader of the party. He never showed me any papers. The prisoners appeared to be acting under his orders. Hogg first mentioned about the papers. When I asked him for the papers I forget what he said. I never saw any papers at all. Hogg came on board at the same time as the prisoners, and they appeared to be acting entirely under his orders. I may have had a conversation with Hogg respecting Jefferson Davis, but he never showed me any letters of marque. We were about fifty or sixty miles from the Confederate waters on the 18th November when this happened. I know *650] I was in 26° 12' when I was taken hold of. Greenhough, my *supercargo, did not show me any documents that were given to him by Hogg.

Charles Carlisle on oath says:—

I am detective constable of Liverpool. When I apprehended Wilson I found in his lodgings the books produced, and also the sextant. At his aunt's I found the box produced. He said that is my chest; I bought it in China. I found the charts produced in his bed-room. He said, "These are my charts." He claimed all except the small chart produced. He said he had bought the sextant in New York. When I apprehended him I told him I was taking him by warrant, under the order of the Secretary of State, for piracy. He said, "I don't know what you are talking about." I said, "I believe your name is Wilson?" He said, "That's not my name." He said his name was Warren Quincey. He said, "I got married in that name three weeks ago." At the police office the captain picked them out from among twelve others. Kelly, or George McMurdoch, said, when I apprehended him, "I don't know what you are talking about. I am not the man—you are mistaken—my name is George McMurdoch." I said, "The warrant charges you in the name of Kelly." He said, "That's not my name."

The other prisoner said his name was George Tevana. He was placed amongst some others and the captain picked him out. He said, "My name on board the ship was Clements; the other two prisoners you have got in custody were also passengers on board." We were engaged by a Major Hogg of the Confederate army. We were served with six-barrelled revolvers each, to go on board as passengers, and to take the ship *651] and cargo *and send the captain adrift. Major Hogg showed me documents signed by a General Bee, saying they were granted by Jefferson Davis to justify us in doing what we have done."

Nelson Lees on oath says:—

I am police constable 90, of Liverpool. I was with Carlisle when the prisoners were apprehended. I saw Wilson give the key of a box to Carlisle, and it opened the box which the captain claims, and in which were the articles which he claims. When Wilson was first apprehended I heard him say, "I have only done what has been done to myself, as a ship was taken from me, and I had to walk 100 miles on land."

James Rushton on oath says:—

I am an eating-house keeper, and live at 39, Park Lane. I know Clements and Wilson, and I have seen the prisoner Kelly once. I have lately had a conversation with Wilson, about three weeks ago. He passed under the name of Sayers. On that occasion he was talking to me about Africa, and what he had been doing in the slave trade. He said that he was captured about six years ago with 800 slaves on board,

when he had been two days out; that he was tried in America, and sentenced to be hung, and was in Fort Lafayette, and got out. He then talked of this schooner; that he was captain of a fine cotton schooner, and had sold her in Balaise, and had come to England to spend the money.

By Mr. Cobb.—This conversation took place in my dining-room about three weeks ago: the day he was married.

I remember the conversation distinctly.

Stat. 6 & 7 Vict. c. 76, on which the case turned, is as follows: "An Act for giving effect to a treaty between *Her Majesty [*652 and the United States of America for the apprehension of certain offenders. 22d August, 1843. Whereas by the tenth article of a treaty between Her Majesty and the United States of America, signed at Washington on the 9th day of August, in the year 1842, the ratifications whereof were exchanged at London on the 13th day of October in the same year, it was agreed that Her Majesty and the said United States should, upon mutual requisitions by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek an asylum or should be found within the territories of the other; provided that this should only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged should be found would justify his apprehension and commitment for trial if the crime or offence had been there committed, and that the respective Judges and other magistrates of the two governments should have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, so that he might be brought before such Judges or other magistrates respectively, to the end that the evidence of criminality might be heard and considered, and if on such hearing the evidence should be deemed sufficient to sustain the charge it should be the duty of the examining Judge or magistrate to certify the same to the proper executive authority, that a warrant might issue for the surrender of such fugitive, and that the *expense of such apprehension and delivery should be borne and [*653 defrayed by the party making the requisition and receiving the fugitive; and it is by the eleventh article of the said treaty further agreed, that the tenth article, hereinbefore recited, should continue in force until one or other of the high contracting parties should signify its wish to terminate it, and no longer: And whereas it is expedient that provision should be made for carrying the said agreement into effect; be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that in case requisition shall at any time be made by the authority of the said United States, in pursuance of and according to the said treaty, for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of the United States of America, who

shall be found within the territories of Her Majesty, it shall be lawful for one of Her Majesty's principal Secretaries of State, or in Ireland for the chief secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's colonies or possessions abroad for the officer administering the government of any such colony or possession, by warrant under his hand and seal to signify that such requisition has been so made, and to require all justices of the peace and other magistrates and officers of justice within their several jurisdictions to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol, for the purpose of being delivered up *654] to justice, according to the *provisions of the said treaty; and thereupon it shall be lawful for any justice of the peace, or other person having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as according to the laws of that part of Her Majesty's dominions would justify the apprehension and committal for trial of the person so accused if the crime of which he or she shall be so accused had been there committed it shall be lawful for such justice of the peace, or other person having power to commit as aforesaid, to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol, there to remain until delivered pursuant to such requisition as aforesaid."

Sect. 2. "Provided always, and be it enacted, that in every such case copies of the depositions upon which the original warrant was granted, certified under the hand of the person or persons issuing such warrant and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

Sect. 3. Offenders may then be delivered up.

Sect. 4. Persons committed may be discharged, if not delivered up according to requisition, and conveyed out of Her Majesty's dominions within two months.

Sect. 5. Act may be suspended within any colony if a similar legislation there by the local Legislature.

*655] *Edward James, Littler and J. H. James* moved that *the prisoners be discharged.—The main question is, whether the Treaty of the 22d August, 1842, and the stat. 6 & 7 Vict. c. 76, founded upon it, extend to piracy by the law of nations, or are confined to such acts as are declared piracy by the municipal law of the United States. Before extradition treaties came into use it was a great question among writers on international law, whether the government of a civilized country to which a person who had committed a crime, especially such a crime as murder, and the like, in another, had fled, was bound to give him up to the latter in order to prevent a defeat of justice, which is the basis of all civilized society. "When foreigners are admitted into a state upon free and liberal terms, the public faith becomes pledged for their protection. The Courts of justice ought to be freely open to them as a resort for the redress of their grievances. But strangers are equally bound with natives to obedience to the laws of the country during the time they sojourn in it, and they are equally amenable for

infractions of the law. It has sometimes been made a question, how far one government was bound by the law of nations, and independent of treaty, to surrender, upon demand, fugitives from justice, who, having committed crimes in one country, flee to another for shelter. It is declared, by some of the most distinguished public jurists, that every state is bound to deny an asylum to criminals, and, upon application and due examination of the case, to surrender the fugitive to the foreign state where the crime was committed. The language of those authorities is clear and explicit, and the law and usage of nations, as declared by them, rest on the plainest principles of justice. It is *the [*656 duty of the government to surrender up fugitives upon demand, after the civil magistrate shall have ascertained the existence of reasonable grounds for the charge, and sufficient to put the accused upon his trial. The guilty party cannot be tried and punished by any other jurisdiction than the one whose laws have been violated, and, therefore, the duty of surrendering him applies as well to the case of the subjects of the state surrendering, as to the case of subjects of the power demanding the fugitive. The only difficulty, in the absence of positive agreement, consists in drawing the line between the class of offences to which the usage of nations does, and to which it does not apply, inasmuch as it is understood, in practice, to apply only to crimes of great atrocity, or deeply affecting the public safety." 1 Kent Comm. on American Law, pp. 36-7, 10th ed.

The present treaty may be looked on as matter of history. Its objects were to fix the boundary between the United States and the Canadian possessions of Great Britain, to abolish the slave trade, and to effect the extradition of criminals.(a) Construing extradition treaties by the light of the pre-existing state of things, they must be understood as referring to crimes committed within the *exclusive* jurisdiction of the state from which the criminal has fled. Perhaps jurisdiction here may mean the *territorial jurisdiction of the state, but it must at least mean the personal jurisdiction which it exercises over all [*657 its citizens, and over all persons within its quasi territory, as for instance on one of its citizens, on board one of its ships, or on a desert island. Carrying on the slave trade is rendered piracy by stat. 5 G. 4, c. 113, s. 9, and it is also piracy in the United States, but not being piracy by the law of nations, trading in slaves by an American ship is not justiciable in England, and vice versa. And another municipal piracy was created by stat. 11 & 12 W. 3, c. 7, s. 8, which, while leaving it legal to prey on the commerce of the enemy, rendered it piracy to attack our shipping under colour of a commission from foreign authority.

The statute in question, 6 & 7 Vict. c. 76, confirms this view. It speaks of *delivering up* to justice, not *bringing* to justice, persons who seek an asylum, i. e., a place where they cannot be punished. Of the crimes mentioned in it all, except murder and piracy, are offences over which there could be no concurrent jurisdiction. In the latter it must

(a) Treaty between Great Britain and the United States, signed at Washington, 9th August, 1842. Ratifications exchanged at London, 13th October, 1842. "A treaty to settle and define the boundaries between the possessions of her Britannic Majesty, in North America, and the territories of the United States;—for the final suppression of the African slave trade;—and for the giving up of criminal fugitives from justice in certain cases." See Hertslet's Collection of Treaties, &c., vol. 6, p. 853, London, 1845. Article 10 is correctly recited in the statute.

exist, for piracy by the law of nations is punishable everywhere. And if a murder were committed by an Englishman in the United States or on board a ship of the United States, it would be an insult to claim extradition. Besides, sect. 4 enacts that, unless given up within two months, the supposed criminal may be set free. If his real crime were piracy by international law our waiting so long would be a disgrace to us. Where a country has jurisdiction to try a criminal,—and every country has jurisdiction to try pirates by the law of nations,—its own honour and dignity will not allow him to be delivered up to another for that purpose.

*658] *There are several authorities. In *Re Kaine*, 14 Howard Sup. Court Cases 103, the British Consul at New York addressed to the Judge of the District Court of the United States for the southern district of New York, and to any Commissioners authorized to perform judicial duties in the matter, a requisition stating that Thomas Kaine had in Ireland fired a pistol at another person with intent to murder him; that a warrant to apprehend him was issued by a justice of the peace, but that Kaine had absconded and fled to the United States; that the crime of which he had been guilty would have justified his apprehension and commitment if it had been committed within the United States; and asked for a warrant for his apprehension to the end that the evidence of criminality might be heard and considered, and, if on such hearing the evidence should be deemed sufficient, that it be certified to the proper executive authority, in order that a warrant might issue for the surrender of such fugitive under the treaty between the United States and Great Britain. Kaine was arrested and brought before a Commissioner of the United States at New York, who held that the evidence was sufficient to justify his commitment, and ordered him to be committed to abide the order of the President of the United States. The Secretary of State issued a warrant directing the marshal to deliver him up to the British Consul. The Supreme Court by a majority of four to three, one giving no opinion on the merits of the commitment, refused to discharge him. Nelson, J., one of the three dissenting Judges, says (p. 137), "The two nations agree, that upon mutual requisition by them, or their officers or authorities respectively made,—that
*659] is, on a "requisition made by the one government, or by its ministers or officers properly authorized, upon the other—the government, upon whom the demand is thus made, shall deliver up to justice all persons charged with the crimes, as provided in the treaty, who shall have sought an asylum within her territories. In other words, on a demand, made by the authority of Great Britain upon this government, it shall deliver up the fugitive; and so in respect to a demand by the authority of this government upon her. This is the exact stipulation entered into, when plainly interpreted. It is a compact between the two nations in respect to a matter of national concern—the punishment of criminal offenders against their laws—and where the guilty party could be tried and punished only within the jurisdiction whose laws have been violated."

In 5 Wheaton's Cases in the Supreme Court of the United States, Appendix, Note 1, is a speech of the Honourable John Marshall (afterwards Chief Justice Marshall), delivered in the House of Representatives of the United States, on the resolutions of the Honourable Edward

Livingston, relative to Thomas Nash, alias Jonathan Robins. [SHEE, J.—The treaty under which that case was decided provides for the extradition of persons charged with murder and some other offences, not piracy.] The principles are the same. “His first proposition, he said, was, that the case of Thomas Nash, as stated to the President, was completely within the twenty-seventh article of the treaty of amity, commerce, and navigation, entered into between the United States of America and Great Britain. The *casus fœderis* of this article occurs, when a person, having committed murder or forgery within the jurisdiction of one of *the contracting parties, and having sought an [*660 asylum in the country of the other, is charged with the crime, and his delivery demanded, on such proof of his guilt as according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial, if the offence had been there committed. The case stated is, that Thomas Nash, having committed a murder on board a British frigate, navigating the high seas under a Commission from his Britannic Majesty, had sought an asylum within the United States, and on this case his delivery was demanded by the minister of the King of Great Britain. It is manifest that the case stated, if supported by proof, is within the letter of the article, provided a murder committed in a British frigate, on the high seas, be committed within the jurisdiction of that nation. That such a murder is within their jurisdiction, has been fully shown by the gentleman from Delaware. The principle is, that the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world. The laws of a nation are rightfully obligatory on its own citizens in every situation, where those laws are really extended to them. This principle is founded on the nature of civil union. It is supported everywhere by public opinion, and is recognised by writers on the law of nations. * * * pp. 5, 6. This general principle is especially true, and is particularly recognised, with respect to the fleets of a nation on the high seas. * * * According to the practice of the world then, and the opinions of writers on the law of nations, the murder committed on board a British frigate navigating the high seas, was a murder committed within the jurisdiction of the British nation. Although such a *murder is [*661 plainly within the letter of the article, it has been contended not to be within its just construction; because, at sea, all nations have a common jurisdiction, and the article correctly construed, will not embrace a case of concurrent jurisdiction. It is deemed unnecessary to controvert this construction, because the proposition, *that the United States had no jurisdiction over the murder committed by Thomas Nash, is believed to be completely demonstrable.* It is not true that all nations have jurisdiction over all offences committed at sea. On the contrary, no nation has any jurisdiction at sea, but over its own citizens or vessels, or offences against itself. This principle is laid down in 2 Ruth. pp. 488, 491. The American government has, on a very solemn occasion, avowed the same principle. The first minister of the French Republic asserted and exercised powers of so extraordinary a nature, as unavoidably to produce a controversy with the United States. The situation in which the government then found itself was such, as necessarily to occasion a very serious and mature consideration of the opinion it should adopt. Of consequence, the opinions then declared, deserve great

respect. In the case alluded to, Mr. Genet had asserted the right of fitting out privateers in the American ports, and of manning them with American citizens, in order to cruise against nations with whom America was at peace. In reasoning against this extravagant claim, the then Secretary of State, in his letter of the 17th July, 1793, says:—‘For our citizens then to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared to the executive and to those whom they consulted, as much against the laws of the land, as to murder or rob, or combine to *murder or rob, its
 *662] own citizens; and as much to require punishment, if done within their limits, where they have a territorial jurisdiction, or on the high seas, where they have a *personal jurisdiction*, that is to say, one which reaches *their own citizens only*; this being an *appropriate part* of each nation, on an element where all have a common jurisdiction.’ The well considered opinion then of the American Government on this subject is, that the jurisdiction of a nation at sea is ‘*personal*,’ reaching its *own citizens only*,’ and that this is ‘*the appropriate part* of each nation’ on that element. * * * * p. 8. A pirate, under the law of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility, is an act of piracy. Not only an actual robbery therefore, but cruising on the high seas without commission, and with intent to rob, is piracy. This is an offence against all and every nation, and is therefore alike punishable by all. But an offence which in its nature affects only a particular nation, is only punishable by that nation. It is by confounding general piracy with piracy by statute, that indistinct ideas have been produced, respecting the power to punish offences committed on the high seas. A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation. But piracy under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offence against all. No particular nation can increase or diminish the list of offences thus punishable. * * * * p. 13. The eighth section, which is supposed to comprehend the case, after declaring, that if any
 *663] person or persons shall commit murder on the *high seas, he shall be punishable with death; proceeds to say, that if any captain or mariner shall piratically run away with a ship or vessel, or yield her up voluntarily to a pirate, or if any seaman shall lay violent hands on his commander, to prevent his fighting, or shall make a revolt in the ship, every such offender shall be adjudged a pirate and a felon. * * * * It is then demonstrated, that the murder with which Thomas Nash was charged, was not committed within the jurisdiction of the United States, and, consequently, that the case stated was completely within the letter and the spirit of the twenty-seventh article of the treaty between the two nations.”

In the second annotated edition of Wheaton’s International Law, by Lawrence, p. 236 :—“In the negotiation of treaties stipulating for the extradition of persons accused or convicted of specified crimes, certain rules are generally followed, and especially by constitutional governments. The principal of these rules are, that a state should never authorize the extradition of its own citizens or subjects, or of persons accused or convicted of political or purely local crimes, or of slight

offences, but should confine the provision to such acts as are, by common accord, regarded as grave crimes." And note 78 there:—"A convention for the same object as those with England and France was made with Prussia, on her own behalf and that of several other German states, on the 29th April, 1845; but it differed from the preceding ones in that each power excepted the extradition of its own subjects." *Id.*, p. 242:—"In the construction of the British treaty of extradition a crime committed at sea, on board of an American vessel, has been considered the same as if committed in the *territory of the United States. [*664 Mr. Buchanan to Mr. Marcy, August 3d, 1855. MS. State department. Mr. Cushing also considers, in reference to the French treaty, where a crime is committed at sea, it is committed within the putative territory of the Union, is justiciable by the Federal judiciary alone, and is, therefore, rightfully a case of extradition. Opinions of Attorneys-General, vol. 8, p. 84. Mr. Cushing, Sept. 6, 1856." Wheat. Int. Law, p. 735, 2d annotated ed.:—"This jurisdiction is exclusive, only so far as respects offences against the municipal laws of the state to which the vessel belongs. It excludes the exercise of the jurisdiction of every other state under its municipal laws, but it does not exclude the exercise of the jurisdiction of other nations, as to crimes under international law; such as piracy, and other offences, which all nations have an equal right to judge and to punish." Sir L. Jenkins, in his works, vol. 2, p. 714, cited in Wheat. Int. Law, 256, note (1), 2d annotated ed., says, "Every man, by the usage of our European nations, is *justiciable* in the place where the crime is committed; so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they may be taken."

Secondly. The warrant of a justice of the peace under this statute, to apprehend or commit a person for trial, must be founded on one from the Secretary of State, who has no power to issue his except on the view of an original warrant issued and depositions taken in America: which does not appear here. Sect. 1 only speaks of requisition being made for the delivery up of parties *charged*, which must mean accused before some tribunal; and sect. 2 enacts that "copies of the depositions upon *which the original warrant was granted, &c., may be received in [*665. evidence of the criminality of the person so apprehended:" and the latter end of the former section empowers the justice to issue his warrant upon such evidence as would justify apprehension and commitment for trial in this country. [BLACKBURN, J.—Suppose a fugitive jumps overboard and escapes, no depositions could be taken against him in his absence, but could his extradition not be claimed?] Wheaton Int. Law, 2d annotated ed., p. 241, note 78:—"The practice of our own government, as well as that of Great Britain, requires that all claims of extradition should be founded on a judicial warrant, with proper evidence to justify the warrant; the United States will not, therefore, make a demand on Great Britain for a person alleged to be a fugitive from the justice of one of the United States without the exhibition of a judicial warrant, issued on sufficient proof by the local authority. Opinions of Attorneys-General, vol. 6, p. 485. Mr. Cushing, May 31, 1854. But in granting his mandate, at the request of a foreign government, for the purpose of commencing proceedings, the President does not need such evidence of the criminality as would justify an order of extradi-

tion, but only *prima facie* evidence. *Id.* p. 217. Mr. Cushing, November 9, 1853." *Id.* p. 242 :—"A mere notification from a foreign legation that a party guilty of a crime has escaped and perhaps fled to the United States, is not sufficient to justify the preliminary action of the President. The general rule is that the government of which extradition, whether by comity only (Klüber, § 66, Martens, *Précis*, § 101), or by treaty, is demanded, before it is called on to act must have reasonable *prima facie* evidence of the guilt of the party submitted to it as *666] *well as the demand by the executive authority. Opinions of Attorneys-General, vol. 7, p. 6. Mr. Cushing, November 2, 1864. A *mandat d'arrêt* issued upon suitable evidence by the proper judicial authority of France, and setting forth the crime imputed to the accused, is sufficient to justify the preliminary action of the President for the arrest of the alleged fugitive, leaving the ulterior question of his actual tradition to depend on the full evidence of criminality then, as it appeared from the despatch of the Minister of Foreign Affairs, on its way from France. *Id.* pp. 285, 537. Mr. Cushing, June 18, 1855, October 4, 1855. But to justify the commencement of proceedings in extradition, it must appear that the criminal acts charged were committed in the territorial jurisdiction of the demanding government. *Id.* vol. 8, p. 215, Mr. Cushing, November 29, 1856." In *Re Kaine*, 14 How. 103, Nelson, J., says, p. 145 :—"This species of evidence is very differently guarded, in the Act 6 & 7 Vict. There, copies of the depositions laid before the government, and upon which the proper officer issued his warrant to the magistrates, authorizing them to institute proceedings to arrest and commit the fugitive, are those only permitted to be given in evidence. In other words, copies of the depositions upon which the government acted in the matter, are admissible as evidence of the criminality." Taney, C. J., and Daniel, J., concur in this judgment, p. 148. [COCKBURN, C. J.—It may be a salutary rule for the executive to say to the claiming power, "Before we act on your requisition we must see that there is a charge which has received a judicial inception in your country." But the statute in question does not require it.] *667] Thirdly. The warrant of the magistrate is also bad *for not showing that all the witnesses before him were examined upon oath. Such warrants ought to contain on their face everything necessary to give jurisdiction: *Christie v. Unwin*, 11 A. & E. 373 (E. C. L. R. vol. 39); *In re Peerless*, 1 Q. B. 143 (E. C. L. R. vol. 41); *Ex parte Besset*, 6 Q. B. 481 (E. C. L. R. vol. 51); especially where, as here, the magistrate was acting under a special jurisdiction. In *Mash's Case*, 2 W. Bl. 805, a return to a habeas corpus stated that a man was charged on suspicion of waiting with intent to assist in the running prohibited or uncustomed goods, against stat. 9 G. 2, c. 35, ss. 18, 19, and the commitment recited that he desired time to make it appear that he was not concerned in any of the practices charged, whereupon he was committed to custody, "there to remain and continue, until he shall be discharged from thence, by due course of law," the commitment was held bad; the Court saying, "The true distinction is; that, where a man is committed for any crime, either at common law, or created by Act of Parliament, for which he is punishable by indictment; there he is to be committed, till discharged by due course of law :—but, when it is in pursuance of a special authority; the terms of the commitment must be special, and

exactly pursue that authority." In *Kite and Lane's Case*, 1 B. & C. 101 (E. C. L. R. vol. 8), on the discussion of a rule for a habeas corpus, it appeared that a boat with the two prisoners on board was seized within the harbour of Folkstone for a breach of the revenue laws. They were taken on shore and afterwards to Dover, where they were convicted before two justices of the peace for that place, the conviction being according to the 2d form given in stat. 3 G. 4, c. 110. The jurisdiction of the magistrates for Folkstone *extended to the place where the seizure was made, and the justices of Dover had no jurisdiction [*668 there. It was held that the convictions were bad for not showing that the justices of Dover had jurisdiction over the offence. In *Nash's Case*, 4 B. & A. 295, the return showed that a seaman was charged with having been found on board a smuggling vessel liable to forfeiture, was carried before a justice, &c., and, upon due proof as required by stat. 57 G. 3, c. 87, was committed to answer such information and abide such judgment as might be given: this was held insufficient. Abbott, C. J., says, p. 297: "This Act of Parliament of the 57 G. 3, c. 87, is one highly beneficial in preventing frauds upon the revenue; but at the same time, inasmuch as it trenches very strongly on the liberty of the subject, we must take care that its provisions are strictly pursued. This averment is one of a conclusion of law; it states that upon due proof the party was committed. Now whether that was so, this return does not enable us to judge; for unless we know what the proof was which was given, it is impossible for us to tell whether it was the proof required by the Act of Parliament. The circumstances stated in the introductory part of this return, seem to me to be quite sufficient to warrant this commitment; and if it had been stated, that upon due proof of the matters before mentioned, the prisoner was committed, I should have thought it sufficient. In the present case, however, the prisoner must be discharged." [BLACKBURN, J.—Suppose the magistrate's warrant defective in this respect, it could be cured by a fresh warrant. We would not discharge on habeas corpus for such a reason.]

Fourthly. The magistrate's warrant is against the *prisoners [*669 for piracy by the law of nations, but there was no evidence on which they could properly be committed to take their trial for that offence. In time of peace any act of depredation on a ship is *prima facie* an act of piracy: but in time of war between two countries, the presumption is that depredation by one of them on a ship of the other is an act of legitimate warfare. It is immaterial whether the act was done by soldiers or volunteers, and whether it was commanded by the belligerent state, or when done ratified by it. There is nothing here to rebut that presumption, for the Confederate States, in whose name this ship was seized, have been recognised as belligerents. [They referred to the debate in the House of Lords, 16th May, 1861, cited in note 79 to Wheat. Int. Law, p. 250, *et seq.*, 2d annot. ed.] "It was not until the fifteenth century that commissions were made necessary, and were issued to private subjects in time of war, and that subjects were forbidden to fit out vessels to cruise against enemies without license. There were ordinances in Germany, France, Spain, and England, to that effect. It is now the practice of maritime states to make use of the voluntary aid of individuals against their enemies, as auxiliary to the public force; and Bynkershoek says, that the Dutch formerly employed no vessels of

war but such as were owned by private persons, and to whom the government allowed a proportion of the captured property, as well as indemnity from the public treasury. Vessels are now fitted out and equipped by private adventurers, at their own expense, to cruise against the commerce of the enemy. They are duly commissioned, and it is said not to be lawful to cruise without a regular commission. Sir Matthew Hale held it to be depredation *in a subject to attack the enemy's vessels, except in his own defence, without a commission.^(a) The subject has been repeatedly discussed in the Supreme Court of the United States, and the doctrine of the law of nations is considered to be, that private citizens cannot acquire a title to hostile property, unless seized under a commission, but they may still lawfully seize hostile property in their own defence. If they depredate upon the enemy without a commission, they act upon their peril, and are liable to be punished by their own Sovereign; but the enemy is not warranted to consider them as criminals, and, as respects the enemy, they violate no rights by capture. Such hostilities, without a commission, are, however, contrary to usage, and exceedingly irregular and dangerous, and they would probably expose the party to the unchecked severity of the enemy; but they are not acts of piracy unless committed in time of peace. Vattel, indeed, says,^(b) that private ships of war, without a regular commission, are not entitled to be treated like captures made in a formal war. The observation is rather loose, and the weight of authority undoubtedly is, that non-commissioned vessels of a belligerent nation may at all times capture hostile ships, without being deemed by the law of nations pirates. They are lawful combatants, but they have no interest in the prizes they may take, and the property will remain subject to condemnation in favour of the government of the captor, as *droits of the admiralty*. It is said, however, that in the United States the property is not strictly and technically condemned upon that principle, but *jure reipublicæ*; and it is the settled law of the United States, *671] that all captures made *by non-commissioned captors are made for the government:" 1 Kent Com., p. 95, 10th ed. [They also cited *The Melomane*, 5 Rob. Adm. R. 41.] The prisoners having gone on board this ship as passengers was a lawful stratagem of war, which, although it might render them liable to be severely visited by the other belligerent party, does not, as regards neutrals, convert them into pirates. In *The United States v. Palmer*, 3 Wheat. 610, Johnson, J., says, p. 642, "When open war exists between a nation and its subjects, the subjects of the revolted country are no more liable to be punished as pirates, than the subjects who adhere to their allegiance; and whatever immunity the law of nations gives to the ship, it extends to all who serve on board of her, excepting only the responsibility of individuals to the laws of their respective countries."

Lush, Milward and Vernon Lushington, contra.—First. Independent of extradition treaties, the governments of England and the United States of America lie under no obligation to deliver up fugitives to each other. Some early writers asserted the contrary, but it was rarely done, and the authority already cited from Kent Com. 36–7, 10th ed., is decisive against it. No state would deliver up its own subjects to another, and with respect to England, in particular, the Sovereign could not deli-

(a) Hargr. Law Tracts, 245–7.

(b) B. 3, c. 15, sec. 226.

ver up any person even under a treaty. The earlier extradition treaties between the two countries did not extend to the offence of piracy, but, each having a vast maritime commerce, it was found necessary to include it in the later. Before the treaty, murder by a British subject committed on sea or in any foreign *country could be punished here [*672 by stats. 27 H. 8, c. 4, 28 H. 8, c. 15, and 9 G. 4, c. 81, s. 7; and piracy on the high seas could be punished anywhere, no matter by whom and against whom committed; but, if the other side are right, the extradition of the latter could not be claimed, and justice would be defeated. The words in the present treaty should be understood in their ordinary sense: for it is made between nations speaking the same language, and have similar laws; and murder, piracy and robbery have the same signification in the jurisprudence of both. The statute is founded on the treaty, which it recites, but in the construction of Acts of Parliament the effect of a statute is not necessarily limited by the language of the preamble, as appears from the cases collected in 2 Darris on Statutes, p. 661, 2d ed.

The term "jurisdiction" has two different significations: first, its primary natural sense,—the right to deal with particular things or persons. Second, and this is its far more common acceptation,—the territorial limits within which that authority is exercised. It is in this latter sense that the word is used in the treaty and the statute. The former, which is the language of both the contracting parties, says it was "agreed that Her Majesty and the said United States should, upon mutual requisitions, &c., deliver up to justice all persons who, being charged with the crime of murder, &c., committed within the jurisdiction of either of the high contracting parties, should seek an asylum or should be found within the territories of the other." Either of the expressions "jurisdiction" or "territory" would extend to all places where the laws of the country have authority, and would therefore include offences [*673 *committed on shipboard; since for the purposes of law, protection and punishment a ship is part of the territory of the nation to which she belongs: Wheat. Int. Law, p. 208, 2d annot. ed.; Reg. v. Lopez, Dears. & B. 525; and the speech of Chief Justice Marshall, already referred to.(a)

The term "piracy" is here used in its natural and larger sense, as understood by both countries, namely, piracy against the law of nations: and if so it is absurd to speak of it as being against the *peculiar* jurisdiction of any country, for it is a matter affecting the whole world, and against the law of every country: although piracy on board an American ship would be piracy against the municipal law of America. In order to adopt the construction contended for by the other side, the Court must insert in the treaty and the statute the word "exclusive" before jurisdiction. [They cited *The United States v. Gibert*, 2 Sumn. 19.] [COCKBURN, C. J.—Suppose a British subject charged with a crime committed in America, or on board an American ship, were tried and acquitted here, and the American government were dissatisfied with the result, could they claim him?] No. For the laws of America, as well as ours, recognise the principle that a person once acquitted is acquitted for ever. It is not to be supposed that either nation would make any unreasonable requisition for the delivery up of pirates; and there would

be no abatement of national honour in giving up prisoners on any reasonable one, for the concession by extradition is mutual.

Secondly and thirdly. It may be conceded that it is the practice both *674] in England and America to require the *original depositions to be produced, but stat. 6 & 7 Vict. c. 76, does not render it necessary. The word "charged" is used in sect. 1 in the sense of accusation, for in a subsequent part of the same section the party is spoken of as the person "accused." The proceedings authorized by the statute are in analogy with those under stat. 11 & 12 Vict. c. 42, s. 1, which enables a magistrate to issue his warrant for the apprehension of any person suspected of crime. Moreover stat. 8 & 9 Vict. c. 120, which was passed for facilitating the execution of the statute in question, 6 & 7 Vict. c. 76, and of stat. 6 & 7 Vict. c. 75 (for giving effect to an extradition convention with France), enacts, that any Police magistrate of the Metropolis to whom the Secretary of State shall signify by warrant that requisition, under either of these statutes, has been made to deliver up any person, may issue his warrant for the apprehension of that person, which may be executed in any part of England. It would be strange if different preliminaries were required when the warrant is issued by a Metropolitan Police magistrate and a magistrate anywhere else. If depositions taken in America were requisite to found the jurisdiction in question, persons committing murder in American ships coming up the Channel would escape with impunity. [They were then stopped on these points.]

Fourthly. The principles of international law on this part of the case, which have been laid down by the other side, may be conceded, and it may be that volunteers stand in this respect on the same footing as regular troops. [COCKBURN, C. J.—In order to be pirates, the act must be done *animo piratico*, although I am not certain if that expression is classical. Volunteers *intending to act for belligerent *675] purposes cannot be so looked on.(a)] [They referred to the State documents respecting prize in Maclachlan's Merch. Shipp. 465.] There was ample evidence to warrant the magistrate in committing these prisoners to take their trial for piracy by the law of nations. The act done by them was on its face piratical, and not belligerent. There is no proof that they seized this vessel for the Confederate government, or even that they belonged to the Confederate States.

Edward James, in reply.—The general design of stat. 6 & 7 Vict. c. 76, was to secure justice where it would otherwise fail, but piracy by the law of nations is punishable anywhere. The law of England and that of America are not entirely the same with regard to murder: *Re Anderson*, 30 L. J. Q. B. 129, 7 Jur. N. S. 122. [He also contended that the evidence did not show a piracy by the law of nations.]

COCKBURN, C. J.—The principal question is, what construction is to be put on stat. 6 & 7 Vict. c. 76, which gave effect to the treaty of 9th August, 1842, between the Queen of Great Britain and the United States of America, for the extradition of offenders. Besides that question, however, some minor ones have been raised as to the regularity of the proceedings under which the prisoners before us have been apprehended, and from time to time remanded.

(a) "*Piraticus*" is good Latin; and we find the expressions "*piraticum bellum*" and "*piratica statio*." See *Facciolati's Lex.*, voc. "*Piraticus*."

It has been suggested that, prior to the issuing of the magistrate's warrant for the apprehension of these *persons, there should [*676 have been an original warrant for the same purpose in the United States, and that warrant and the depositions taken on it made the foundation of the application by that government to the government of this country. I think this point is untenable. It seems to me that the second section of the statute in question, on which with respect to this point reliance must be placed, does not require that there should be proceedings or any warrant or depositions in the United States. The sole effect of the proviso in that section is, that whereas by sect. 1 a justice of the peace may, upon such evidence as according to the law of this country would justify the apprehension and committal for trial of the accused person if the crime had been committed here, issue his warrant for his apprehension, sect. 2 introduces a proviso upon it, the effect of which is that, although there must be evidence before the justice of the peace, a warrant to commit or remand may be made upon a copy of the original depositions, and of the warrant, if there was a warrant in the United States.

Then it is objected that the warrant of the justice of the peace was imperfect, because it did not set forth that there was evidence before him taken on oath as a foundation for those proceedings. I think Mr. *Lush* met that by pointing out that by the subsequent statute, 8 & 9 Vict. c. 120, a form of warrant of commitment by Metropolitan Police magistrates was given for cases under that statute, and I do not think the Legislature intended there should be any difference between the form of warrant when the committal is by a stipendiary magistrate in the Metropolis, and when it is by any other justice of the peace.

*I therefore come to the great question before us, what is the true construction of this statute? The words of it in their primary and ordinary acceptation are undoubtedly sufficient to meet this case; for by them provision is made for delivering up criminals who have been guilty of "piracy" committed within the jurisdiction of the United States of America. Passing by for a moment the question, whether there is here *prima facie* evidence of piracy, there can be no doubt that, if what was done by the prisoners amounts to anything, it amounts to piracy *jure gentium*, and the statute in express terms provides for the case of piracy committed within the jurisdiction of the United States. Here, then, assuming for the present purpose that there is evidence of piracy, and of its having been committed on board a vessel of the United States, it is within the jurisdiction of the United States. Then comes the question whether that suffices; and the main argument on which reliance is placed on the part of the prisoners is that the statute is to be read as applicable only to cases where the offence is committed within the *exclusive* jurisdiction of the United States, by whom the demand for extradition is made. If the term piracy in this statute is to be read as meaning piracy *jure gentium*, then it appears to me that the case put forward by the prisoners is at once disposed of: for if the contracting parties intended that piracy *jure gentium* should be included, and the statute was passed to give effect to that intention, then as piracy (as has been abundantly shown by authority) is an offence not against any particular state alone, but against the whole civilized world, and is cognisable by the tribunals of all civilized nations, this

*678] would not be the case of an offence committed within the *peculiar jurisdiction of the United States. If, therefore, the term piracy in this statute is to be taken in the larger acceptation of the term, the contention of the prisoners falls to the ground. Now, what is there to show that piracy has been used in this statute in a limited sense? If piracy is to be restricted to piracy by municipal law, as piracy by municipal law distinct from piracy *jure gentium* is not cognisable generally by the tribunals of all countries, then undoubtedly the consequence I have pointed out does not take place, and the statute may be read, as Mr. *James* in his most able argument contended it must be, as referring to piracy in the exclusive sense, and the jurisdiction over it will be exclusive also. But it strikes me very forcibly that, if that had been the intention of the parties, we should have had piracy by municipal law distinguished from general piracy in express terms. There is no such thing here, so that if it was intended to limit the treaty and the statute to cases where there is an *exclusive*, not a *concurrent* jurisdiction, we should have found that term "exclusive" introduced. But the language is most comprehensive; and why, then, is it to be construed in a limited sense? It is said, and with truth, that the primary and original mischief, which the statutes of extradition meant to prevent, was that of persons committing crimes in one state, and escaping beyond the reach of the law of that state, and so enjoying impunity; and it is also contended that for that purpose alone were those statutes passed. That that was their primary and principal object I entertain no doubt, but that that was the *only* one I entertain great doubt; for it is impossible not to see that the mischief which it is the object of all civilized states to prevent is not limited to such cases. An offence may

*679] *be cognisable, triable and justiciable in two places, *e. g.*, a murder by a British subject in a foreign country. A British subject who commits a murder in the United States of America may be tried and punished here by our municipal law, which is made to extend to its citizens in every part of the world. But it would be highly inconvenient, except in certain exceptional cases, that he should be tried in this country for that crime, because criminals escape, not only by being beyond the reach of the law which they have offended, but in consequence of the difficulty, if not impossibility, of proof, unless the offender is brought to justice where the offence has been committed. If, therefore, I find the language of a statute large enough to comprehend both instances, it would be highly inexpedient to restrict it to one alone.

It has been urged with great force that it would be inconsistent with the dignity of this country to surrender its jurisdiction in such cases, and where we have co-ordinate jurisdiction to allow a prisoner to be taken away and tried elsewhere; but it appears to me that the moment we say we will give up offenders to promote the interests of justice, in which all nations are concerned, the principle is conceded. I do not see any loss of dignity, of national greatness, or character, where crimes are committed by our own subjects in a foreign state, if we give them up when that state requires the surrender of them for the purposes of justice, because it can be better done there than here: and, looking at the general balance of convenience I should say, if the treaty and the statute are not capable of the construction I have put, then the treaty

and the statute have failed in doing all that was intended to be done by the diplomatists of the two countries and the Legislatures of each.

*Consequently, if there be evidence here on which the magistrate was justified in committing these parties, the case is within [*680 the terms of the statute. The term "piracy" must be taken here (as there is nothing to limit its operation) in its comprehensive sense of piracy jure gentium, and that being so when we come to speak of jurisdiction, we cannot limit it by the introduction of a term "exclusive" which is not there. The view of Mr. *Lush*, in his most able argument, is that the term "jurisdiction" means the area, whether by land or water, over which the law of a country prevails, and it is admitted that a ship is part of the territory of the state, or at all events that this ship was within the jurisdiction of the United States, so as to come within the statute.

Therefore, although I regret to differ from my learned brothers on a matter of so much importance, I must hold that this case comes within the words as well as the spirit of the Act, and consequently that the prisoners are not entitled to be discharged.

As to the remaining question, viz., whether, supposing the piracy spoken of in this Act to mean piracy by the law of nations, there is a case on which the magistrate ought to commit these prisoners, I cannot say that there is not evidence under which he was entitled to do so,—a *prima facie* case was made out, and he was justified in coming to that conclusion. I quite agree with Mr. *James* as to acts done by parties with the intention of acting on the behalf of one of the belligerents. If persons who are not the subjects of a belligerent state take arms in its support; although by so doing they may violate the law of their own country against volunteering on foreign service, and even render themselves subject to a rigour from the opposite party happily *un- [*681 known in modern times; still if the act is not done with piratical intention, but with the *bonâ fide* intent to aid one of the belligerent parties, they cannot according to any recognised law be treated as pirates. But it is not because persons assume the character of belligerents that they can protect themselves from the consequences of an act really piratical. Here the parties declared they acted as they did in the name of the Confederate States of North America. Mr. *James* says that this was equivalent to hoisting the Confederate flag; but then he was also forced to admit that the flag of a nation is often hoisted by pirates, and the same may be done by persons for belligerent purposes. I admit that these parties saying "We seize this vessel for the Confederate States" gives rise to a presumption that such is the fact, but we must look into the case to see if this was done with a piratical intention. I do not wish to say what would be the effect of the evidence if submitted to a jury, but when upon that evidence this Court is asked to oust the jurisdiction of the magistrate I consider it would not be justified in so doing.

As however my brothers hold that the prisoners are entitled to their discharge, it is unnecessary to dilate more on this part of the subject.

CROMPTON, J.—I speak with great diffidence on this case, for I did not hear the first argument. The question has, however, been so fully and so ably argued now that no more light can be thrown upon it.

This is a *habeas corpus* to discharge these prisoners as being in ille-

gal custody. There has been a warrant of a justice of the peace, with respect to which I quite agree with my Lord Chief Justice that it is not *682] necessary *to have the proceedings in America before us. Remands were made from time to time, but there has been no final commitment. It is not in general the practice of this Court to interpose before the magistrate has given his final decision, seeing that on a future hearing before him fresh evidence might be adduced. I say this, speaking with reference to the future, for I cannot help seeing that the last of these remands was made in order to ask our assistance.

Taking the case, then, to be as if the prisoners had been committed, is there in point of law anything to show that they could be legally convicted? That is a pure question of law. There is another question of law here, but one which arises on the evidence, namely, was there so much evidence as the magistrate might, in his discretion, reasonably commit these persons for delivery over to the American Government? The Legislature has not intrusted to us, but to the magistrate, to decide that; still we have the power of saying there was *no* evidence on which he could legally come to that conclusion. I cannot, however, take that view. I cannot say that I have made up my mind that he should commit the prisoners, for what was done by them looks very like a belligerent act. But, looking at the surreptitious way in which this ship was taken by persons coming on board her from a port of another country, and at the fact of there being no evidence that the prisoners who took her were citizens of the Confederate States, I cannot say the magistrate had no evidence before him. It might be slight evidence, and I do not say what a jury would think about it.

On the main point, I have carefully considered the whole argument, *683] and although at one time I was not *clear on the subject, I have come to a different conclusion from my Lord Chief Justice. I take practically the view which Mr. *James* has taken. The question turns on stat. 6 & 7 Vict. c. 76, and looking at the preamble, which at all events can be used as a key to the statute, we find these words in it:—"Persons who, being charged with the crime of murder, &c., or piracy, &c., committed within the jurisdiction of either of the high contracting parties," this looks as if persons within the jurisdiction of one of the parties and not of the other were intended, "should seek an asylum, or should be found within the territories of the other," and Mr. *James* is right in saying that "asylum" means a place where the matter may not be tried. The statute then provides for the delivery up to justice "of any person charged with the crime of murder, &c., or with the crime of piracy, &c., committed within the jurisdiction of the United States of America, who shall be found within the territories of her Majesty." "Committed within the jurisdiction of the United States of America," I own, appears to me to mean within the *peculiar* jurisdiction of the United States, and would not be properly used if the common jurisdiction of every maritime nation in the world were meant.

Many cases were put to show the great inconvenience of any other construction. It was said, suppose a British subject had been tried and acquitted here for a crime committed in America, or on board an American ship, is he to be given up afterwards? And although to that Mr. *Lush* answered that it would not make a case for extradition where the party has been acquitted in this country, still if the case were before

any of our Courts, there would be great inconvenience at the least. *Then it was said that, if nations have a common jurisdiction, when one has got him the other could demand him; and here also [*684 there would be great inconvenience.

The parties seeking to deliver up these persons are in dilemma. What they have done is either a belligerent act, in which case it is not pretended they could be treated as pirates, or it is piracy. I think we must take it as a case of piracy by the law of nations, the nature of which is shown by the evidence and warrant. It is like the case which often happens of the crew and passengers seizing a vessel, whereupon they all become pirates. Then the question is, is this a piracy within the words of the statute? It is to be within the jurisdiction of the United States; but does that mean within the jurisdiction which the whole world shares with them? It must mean where they have a *peculiar* jurisdiction; although whether that would apply to all cases where we have jurisdiction in foreign countries we need not determine. It is not to be lost sight of that this view agrees with what was supposed, at the time of the treaty, to be the rule of nations about delivering persons up to other nations to be tried; which was done very seldom. It also agrees with the judgment given in *Re Kaine*, 14 How. 103. The word "only" is used by Nelson, J., in his very able judgment, and he puts it as Mr. *James* does. It is said the point was not there decided, but in that judgment, which is acquiesced in by the other two Judges, the statute is expounded to apply to cases where the party could only be tried in the territory to which he was to be delivered up. It is very difficult to my mind to suppose that two of the great maritime nations *of the world meant to give up their power of trying pirates wherever [*685 they were caught. Suppose an American ship, an English ship, and a French ship all seized at once by pirates. It is said we must trust that the other power party to this treaty will not require us to deliver up prisoners when it is not reasonable for them to do so. But I cannot subscribe to that doctrine; it is better to say we will not give them up. I will not go through the cases about murder,—perhaps there the theory of a personal jurisdiction would apply. Both parties agree that there are such things as municipal piracies. It has been urged that the question of piracy might depend on whether or not it was a ship of America or of some other nation that was taken. This can hardly be so; it must be piracy by the law of nations, and these persons are not pirates of one nation or another, but pirates against every nation.

The principal argument is said to be, that this was a ship of the United States, and, therefore, this jurisdiction was peculiarly for them. Suppose these persons rose up in mutiny, that is no less a piracy against the law of nations, and all other powers have the same jurisdiction to punish, although a ship is part of the territory of the country to which she belongs. These parties having been on the ship for a moment of time does not alter the character of the act. Suppose they had been in another ship, which sank in their attempt to seize this, it would be a question whether they came honestly from that other ship with their boats, or had recourse to the ruse which was practised here; in either case the acts are acts of piracy of the same nature, and do not alter the question of the ship being part of the exclusive jurisdiction.

*686] *I agree with the Lord Chief Justice that there is nothing degrading to this country if, for purposes of justice, they give up a criminal; besides, we must remember that argument might also be used on the side of the American government.

The prisoners are, therefore, entitled to be discharged.

BLACKBURN, J.—I agree with my brother Crompton, that on the case as it now stands, the prisoners are entitled to be discharged. They have been committed by force of a warrant granted under an extradition treaty, and remanded from time to time, and although the proceedings before the magistrate have not formally come to a conclusion, it has been agreed that we are to consider the matter as if they had. I likewise agree with my brother Crompton that there are inconveniences in dealing with a case as if something had happened that might have happened, but has not; and I mention it in order that this be not made a precedent.

The question therefore is, on what does the right of delivering these men to the American government depend? We have no such right except by stat. 6 & 7 Vict. c. 76, which gave and limits our power. The Act was passed to carry out a treaty, the terms of which it recites, namely, that each of the high contracting parties "should deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek an asylum, or should be found within the territories of the other."

*687] The treaty is an agreement between those high *contracting parties, and is to be construed according to the same rules as a contract between two subjects. Now what is meant by the words "committed within the jurisdiction of either of the high contracting parties"? Looking at the words alone (and here I do not agree with the Lord Chief Justice), they mean crimes committed within the jurisdiction of one party, and not within a common jurisdiction. We must, then, consider the state of affairs previous to the treaty, and its object; namely, to bring to justice persons who could not have been brought to justice before.

Then, have the Legislature used words sufficient to carry out this object? The main argument of Mr. *Lush*, that this statute is applicable to piracy jure gentium, and if applicable to it must be applicable to that alone, for the punishment of piracy jure gentium cannot be restricted to the law of any particular country. But it appears clearly enough, both from the American authorities and our own, that they are offences called piracy by the laws of those respective countries which are not piracy by the law of nations. It does not follow from thence that piracy jure gentium need be excluded; but when we come to the question, whether it is within the jurisdiction of either country, the taking piracy in this treaty to mean piracy jure gentium is not satisfactory. Those words in the treaty are followed in the Act, which, by sect. 1, provides for the extradition of persons charged with the crime of murder, &c., or with the crime of piracy, &c., "committed within the jurisdiction of the United States." Then comes the question, does that mean within the jurisdiction of one party exclusively? I do not say how that would be in the case of a murder committed within the

United *States by a British subject, over whom we have a personal jurisdiction. It is enough to say Mr. *Lush* convinced [*688 me that much might be said on that subject, and if the case turned upon it I should have wished for time to consider. But this is a question of piracy which does not depend on any personal, but on general, jurisdiction. In proof of this, I take the following from 1 Kent Comm. 186, 10th ed. :—"It is of no importance, for the purpose of giving jurisdiction, on *whom* or *where* a piratical offence has been committed. A pirate, who is one by the law of nations, may be tried and punished in any country where he may be found, for he is reputed to be out of the protection of all laws and privileges. The statute of any government may declare an offence committed on board its own vessels to be piracy;" and I may add, though Kent does not say it, "on other vessels." He goes on, "And such an offence will be punishable exclusively by the nation which passes the statute. But piracy, under the law of nations, is an offence against all nations, and punishable by all."

That is good English law, but I quote it by preference from an American author, because it shows that both parties were aware of that state of international law. Now, would piracy by the law of nations be within the exclusive jurisdiction of either nation?—municipal piracy of course would. I believe the American and English statutes almost correspond with each other; and that being so, I should think it pretty clear it was intended that municipal piracy should be included in this treaty, and that America would give up to us persons who committed it, and vice versa; but persons who have committed piracy by the law of nations are not within the words or the mischief of the statutes. No doubt *there are cases where it would be more convenient for [*689 piracy *jure gentium* to be tried in one country than in another. But we have no power to send a man to a foreign country to be tried, because it would be more convenient; for the statute does not make any provision for such cases, or supply any scale for weighing the balance of convenience; so that the whole question comes round to this, is the offence here spoken of piracy by the law of nations or not? No authorities really exist on it, and no further research would throw light on it, for it was argued last Term on the rule for the *habeas corpus* as well as now.

I agree with the Lord Chief Justice on all the other points, except in thinking that the evidence before the magistrate would justify a committal for piracy on the high seas. If I were trying these men for that offence, *i. e.* for robbing and plundering this ship, I could not withdraw the case from the jury. I do not want to prejudge the case, in the event of application being made to a magistrate to commit them for trial in this country, still less to say whether a jury would convict. I only say on the depositions and evidence before us, there is sufficient. But looking at the evidence, what was done by the prisoners is either taking the ship for plunder, which would be piracy *jure gentium*, in which case there is no power vested in us by statute to give them up, or an act of war, and consequently not triable anywhere. For although the Confederate States are not recognised as an existing power, yet they are as belligerents.

I think, therefore, that the prisoners ought not to be detained.

SHEK, J.—We have had the advantage in this case of hearing two

*690] arguments, one on the motion for the rule, *another on the motion for the discharge of the prisoners. I have referred to and considered the cases which have been cited, and agree with my brothers Crompton and Blackburn that the prisoners must be discharged.

The crime with which they are charged, as described in the return, and as appears on the depositions, is "piracy on the high seas," a crime of pre-eminent enormity, and by the law of nations justiciable wherever the offender may be found. It is not, in my opinion, the crime for which, under the name of piracy, extradition is stipulated in the treaty of the 9th August, 1842; the provisions of that treaty were not needed for, nor are they, as it appears to me, applicable to its repression. The treaty provides that persons charged with having committed the crime of murder, assault with intent to murder, piracy (not piracy on the high seas), arson, robbery, or forgery, or the utterance of forged paper, within the jurisdiction of the United States, and seeking an asylum in or found within the territories of our Sovereign, shall, on the requisition of the United States, be delivered up to justice. The object of the 10th article of the treaty, as appears from its provisions and from the title and enacting clauses of stat. 6 & 7 Vict. c. 76, which gave effect to it, was to legalize the apprehension within the territories of the Queen of persons charged with the commission of the crimes mentioned in the treaty within the jurisdiction of the United States, for the purpose of their surrender to that jurisdiction. The persons whose apprehension and extradition are contracted for by the treaty and authorized by the Act of Parliament, are persons "fugitive" from the justice of the United States, and "seeking an asylum," that is (but for the treaty and the Act of Parliament) safe in the asylum of the territories of our

*691] Queen, because not liable to be *arraigned before her tribunals. The words "surrender," "deliver up to justice," mean deliver from an asylum or place of safety up to justice, that is to the ministers of justice of the United States, by whose Courts only, on the persons charged with the crimes imputed, justice can be done. Read with reference to the declared object of the treaty and the Act of Parliament, and by the light which the words "fugitive," "seeking an asylum," "surrender," "deliver up to justice," afford, the words "within the jurisdiction" must, as I think, mean within the exclusive jurisdiction of the United States, and cannot be held to extend to crimes not within any jurisdiction exclusively, but justiciable wherever the person charged with having committed them may be found. It is injurious to suppose that a state should have admitted, in a public treaty, the possibility of its unwillingness or inability to do justice by binding itself to surrender to the justice of another state persons charged with the commission of crimes which it would be the duty of both to punish, and over which both would have jurisdiction. Had this been intended, provision would surely have been made for the case of justice by acquittal or conviction having been done by one state before cognisance of the crime taken by the other—for pleas of *autrefois convict*, or *autrefois acquit*—familiar to the jurisprudence of both states, and for proof by certificate of the record of conviction or acquittal—that the crime for which the offender had been in jeopardy was the crime for which extradition was claimed. But the treaty and the Act of Parliament contain no such provisions, though stipulations for the

extradition of criminals had been long in force between the two governments, and the meaning of the *words "within the jurisdiction" [*692 had been the subject of serious discussion between them. Upon the words, therefore, of the treaty and the Act of Parliament alone I should have been prepared to hold that the words "within the jurisdiction" mean within the exclusive jurisdiction of the state requiring the extradition.

It is satisfactory to have learnt in the course of the argument from the case *In re Kaine*, 14 How. Sup. Court Cases 103, cited by Mr. *James*, that in the American Courts,—to the decisions of which respect is always and most justly paid by us—the same construction had long *ante litem motam* been put upon the treaty by learned Judges of the highest authority.

We have been invited to consider—and I think we must consider—the state of the law in the United States as respects piratical offences before the date of the treaty, in order the more satisfactorily to determine to what extent the provisions of the treaty would take effect if the word "exclusive" were added to the words "within the jurisdiction," that is, first, within the exclusive jurisdiction of the United States as respects the place where the offence was committed; secondly, within the exclusive jurisdiction of the United States as respects the person by whom the offence was committed. It will be seen, I think, on reference to the legislation of the United States, before and at the time the treaty was signed, that consistently with that legislation the words "within the jurisdiction" in both of these meanings may have, as respects offences of a piratical character, a very extensive range, without including the crime of piracy on the high seas. The constitution of the United States gave power to the Congress to define among other crimes the crime of piracy.(a) It was inherent in the *sovereignty of the United States, as respects the subjects of the United States, to designate [*693 as piracy, and punish as piracy, crimes committed within its jurisdiction which were not "piracy on the high seas," not piracy by the law of nations. The Act of Congress of the 30th April, 1790,(b) provides that "If any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted shall suffer death." And by sect. 9, "If any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber,

(a) See Article I., § 8.

(b) 1st Congress, sess. 2, ch. 9, s. 8.

and on being thereof convicted shall suffer death." These provisions, most of which are with little more than verbal alterations taken from our *694] own statute book, include, *as respects citizens of the United States, and persons owing temporary allegiance to them in return for the protection of their laws, not only piracy by the law of nations, but offences also which are piracy only because the municipal lawgivers have chosen so to call them. By an Act of Congress of March 3d, 1819,(a) "If any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, &c., be punished with death." By an Act of Congress of May 15th, 1820,(b) "If any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate: and, being convicted thereof, &c., shall suffer death." And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate: and on conviction thereof, &c., shall suffer death."

It thus appears that the Legislature of the United States, in framing municipal laws for the repression of offences of a piratical character, has always kept in view and made special mention of "piracy on the high *695] seas," grouping with it, however, a large class of offences *which bear a strong family resemblance to it, within the territorial or personal jurisdiction of the United States, but which are not piracy by the law of nations—viz., Robbery "in any river, haven, basin, or bay, out of the jurisdiction of any particular state" of the United States, upon any vessel, or upon the lading or ship's Company of any vessel "in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows;" on land, if the robbery be committed by persons engaged in a piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, who shall land from such ship or vessel, and on shore commit such robbery. Many of the crimes thus defined, though included in a list, at the head of which is "Piracy on the high Seas," and classed with it as equal in guilt and deserving of equal punishment, differ from it in the essential particular that they are not committed on the high seas, but within the territorial jurisdiction of the United States; and being committed within the territorial or personal jurisdiction of the United States, they are offences not against our laws (though we have laws to the same effect), but against the laws of the United States. Regard being had to this legislation, which must have been in full view of the American minister who negotiated this treaty, it is a remarkable feature of the treaty, tending strongly to show that "within the jurisdiction" means within the exclusive jurisdiction, territorial or personal, of the United States, that, though "piracy" committed within the jurisdiction of the United States—and, as if to avoid all cavil as to its meaning—"robbery," are men-

(a) 15th Congress, sess. 2, ch. 77, sect. 5.

(b) 16th Congress, sess. 1, ch. 113, sect. 3.

tioned, "piracy on the high seas,"—piracy by the law of nations—has been omitted.

*For these reasons I am of opinion that the true reading of the words "within the jurisdiction" is within the exclusive jurisdiction of the state requiring extradition. [*696]

As to the last point, I agree with my Lord that the facts before us tend rather to show that the prisoners in what they did acted *animo furandi*, than *animo belligerandi*, and would be sufficient if the point on the meaning of the treaty were against them to justify their committal for trial: and on the points of form, I agree with the rest of the Court.

Prisoners discharged.(a)

(a) The rules of international law relative to the interpretation of treaties are to be found in Grotius, *de Jure belli ac pacis*, lib. 2, c. 16; Vattel, *Droit des gens*, lib. 2, ch. 17; Rutherford's *Institutes*, Book 2, ch. 7; and Wheaton, in his *International Law*, 2 annot. ed., p. 493, refers to them in terms of approval. In this case of *Ex parte Tivnan*, both Court and counsel assumed that where a treaty between England and another country is embodied in an Act of Parliament, the treaty then becomes part of the municipal jurisprudence of this country, and consequently that the statute in which it is embodied must be interpreted or construed according to the rules of British law.

The late Sir George Cornewall Lewis, Bart., in his pamphlet on *Foreign Jurisdiction and the Extradition of Criminals*, p. 39, note, states his opinion as to the meaning of the term "piracy" in conformity with the decision of the majority of the Court in this case.

*CROCKER v. WAINE. May 31.

[*697]

Fines and Recoveries Abolition Act, 3 & 4 W. 4, c. 74, s. 38.—Disposition.—Several instruments.—Enrolment.

1. The term "disposition" in 3 & 4 W. 4, c. 74, s. 38, abolishing fines and recoveries, is not restricted to the deed barring the entail, enrolled in Chancery under the Act, but comprises it and all other instruments by which the arrangement between the vendor and purchaser is carried out.

2. Concessum. A conveyance executed by a tenant in tail to himself or to his own use is a "disposition" under that statute.

EJECTMENT to recover possession of lands and premises situate at Aldsworth in the county of Gloucester. The writ was issued on the 26th March, 1861, and the defendant, who was then in possession, appeared and defended for the whole of them. By consent of the parties, the following case was stated for the opinion of the Court.

Thomas Waine being seised in fee of the lands and premises in question, by his will, bearing date the 23d October, 1815, devised them unto William Hower and George Bevir, and their heirs, to the use of William Hower, his executors, administrators and assigns, for the term of 500 years, upon trust to raise by demise or mortgage a sum of 500*l.* for the benefit of the testator's younger children, and from and after the expiration of that term to the use of the testator's son, John Waine, for life, remainder to George Bevir and his heirs to support contingent remainders, remainder to the use of the first and other sons of John Waine successively in tail, remainder to the use of the testator's right heirs for ever.

The testator died on December 17th, 1815, leaving his son John Waine surviving, and a grandson, Thomas, the eldest son of John Waine. This Thomas Waine attained his age of twenty-one years on the 23d September, 1827.

***698]** *By an indenture of the 9th June, 1817, Richard Waine and William Garne (the then trustees of the term of 500 years), in pursuance of the powers contained in the will, and in consideration of 500*l.*, bargained, sold and demised the premises unto Richard Garlick Bathe, his executors, administrators and assigns, for the term of 400 years, subject to a proviso that if Richard Waine and William Garne, their executors, administrators or assigns, should pay, &c., unto Bathe, his executors, &c., 500*l.* with interest, upon the 9th December, then next, the term of 400 years should cease. On the same 9th June, 1817, Bathe advanced to the trustees a further sum of 42*l.* upon the security of the premises, and by a deed poll of the same date they charged the tenements to him with payment of the 42*l.*, with lawful interest thereon.

By an indenture of the 29th October, 1847, made between Thomas Waine of the first part, Richard Bassett of the second part, and John Arnott and Edward Thomas Jones of the third part; after reciting the will, and that it was believed that the sum of 500*l.*, for raising which certain trusts were declared by the will, had been raised by mortgage of the hereditaments, and that John Waine, son of the testator, and tenant for life under the will, was then still living, and that Thomas Waine was his eldest son, and the first tenant in tail expectant on the decease of his father by virtue of the will: it was witnessed that, in consideration of 300*l.* sterling, Thomas Waine thereby granted unto Thomas Bassett one clear annuity of 25*l.*, charged upon all the hereditaments whereof he Thomas Waine was tenant in tail under the will, and such annuity was made payable during the life of Thomas Waine; and Thomas Waine thereby granted, bargained, sold and confirmed unto John Arnott and Edward Thomas Jones the premises thereby charged ***699]** *with the annuity to hold the same unto them in fee, subject to the life estate of John Waine under the will, and to the term of 500 years created thereby, and the mortgage that might have been made by means of the term, and to the trusts of such term, nevertheless upon the trusts thereafter expressed and declared for better securing the payment of the annuity. And in the indenture was contained a proviso for the redemption of the annuity.

A memorial of this indenture was duly registered in pursuance of the statute in that behalf.

By an indenture made the 25th March, 1845, in consideration of 300*l.* then lent by him, Thomas Waine granted and demised the lands and premises, inter alia, to Isaac Beak, his executors, administrators and assigns, to hold the same for the term of ninety-nine years, if Thomas Waine should so long live, subject to a condition or proviso for redemption on payment of the sum of 300*l.*, with interest, on the 25th September then next.

By an indenture of the 25th March, 1846, in consideration of the further sum of 200*l.*, Thomas Waine charged the lands and premises, inter alia, as a security to Isaac Beak, as well for the payment of the sum of 200*l.*, with interest, as also for the payment of the 300*l.* before advanced, making together 500*l.* with interest, and it was declared that the hereditaments should not be redeemed until all principal and interest secured thereon should be paid.

The sums of 300*l.* and 200*l.* were not paid at the time appointed.

Some time in or prior to June, 1849, an arrangement was come to

between Thomas Waine, the defendant Giles Waine, and their father John Waine, whereby it was agreed that John Waine should, as protector of the *settlement, concur with Thomas Waine in barring [*700 the estate tail and remainders expectant thereon created by the will, in order to enable Thomas Waine to raise the sum of 600*l.* by way of mortgage, and that in consideration thereof, and also of the covenants entered into by the defendant Giles Waine, Thomas Waine should convey the premises subject to such mortgage for 600*l.* to certain uses for raising the sum of 500*l.* for the younger children of John Waine, with remainder to Thomas Waine for his life, with remainder to Giles Waine in fee; and that in consideration of the benefit which the defendant would derive under this arrangement, and in order to assist Thomas Waine in obtaining the loan of 600*l.*, the defendant should concur with him in covenanting with the party advancing that sum for the payment thereof, and that as between the defendant and Thomas Waine the defendant should make himself solely responsible for the payment thereof after the death of Thomas Waine, and further that the defendant should enter into a covenant with certain trustees for payment of the sum of 399*l.* within one month after the death of John Waine, in case Thomas Waine should die in his lifetime, upon trust for the three reputed infant children of Thomas Waine, with certain trusts over in case of their death under the age of twenty-one years, for the younger children of John Waine, except the defendant Giles Waine.

In pursuance of this arrangement, and in part performance thereof, a deed of disposition of the 26th June 1849, was duly made and executed between Thomas Waine of the first part, John Waine, his father, of the second part, and Richard Mullings of the third part, and afterwards duly enrolled in Chancery on the 29th June, 1849, in pursuance of The Fines and *Recoveries Act; whereby Thomas Waine, [*701 with the consent of John Waine, as the protector of the settlement made by the will, conveyed the premises to Richard Mullings in fee, to hold the same subject to the estates created by the will which preceded the estate tail limited to Thomas Waine, but freed and discharged from the estate tail and all other estates tail of Thomas Waine, and all remainders and reversions to take effect after the determination or in defeasance of such estate or estates tail: To such uses, upon such trusts and subject to such powers, provisoes, agreements and declarations as Thomas Waine should by any deed or deeds by him duly executed direct or appoint, and in default of and until such direction or appointment to the use of Thomas Waine and his assigns for life, with a limitation to the use of Richard Mullings and his heirs during the life of Thomas Waine, in trust for Thomas Waine and his assigns, with remainder to the use of Thomas Waine in fee.

In further pursuance and performance of the above arrangement, an indenture of 30th June, 1849, was executed by Thomas Waine of the first part, the defendant of the second part, and Isaac Beak of the third part, and thereby, after reciting the indenture of the 26th June, 1849, and that Isaac Beak had, at the request of Thomas Waine, agreed to lend him 600*l.* upon having the repayment thereof, with interest, secured by a mortgage of the hereditaments, and that upon the treaty for the advance, and as an inducement to Isaac Beak to make the same, it had been agreed that the defendant Giles Waine should enter into such cove-

nant with Isaac Beak for payment of the said sum and interest as was thereafter on his part contained, It was witnessed that in consideration *702] of 600*l.*, to Thomas Waine then paid by Isaac *Beak, Thomas Waine appointed and conveyed the premises unto and to the use of Isaac Beak in fee; subject to a proviso for redemption on payment by Thomas Waine, his executors, &c., to Isaac Beak, his executors, &c., on the 30th December then next, of 600*l.* and interest; and Thomas Waine and the defendant jointly and severally covenanted with Isaac Beak for the payment of that sum.

On the 2d July, 1849, in further pursuance and performance of the above arrangement, an indenture was made between Thomas Waine of the first part, John Waine, the elder, of the second part, the defendant of the third part, and Richard Mullings and John Fowler of the fourth part. After reciting, amongst other things, the indentures of the 26th and 30th of June then last, and that previously to the execution of the former, and in order to induce John Waine, as protector of the settlement created by the will, to give his consent to the disposition made by the indenture, it was agreed between the parties thereto of the first, second and third parts, that the hereditaments should, subject to the mortgage security of Isaac Beak, be settled and assured to the uses and in manner thereafter expressed and contained, and that, in consideration of the benefit to be derived by the defendant under such settlement, he should enter into such covenant with Isaac Beak for payment of the mortgage debt 600*l.*, and interest, as was on the part of the defendant contained in the indenture of mortgage of the 30th June, 1849, and should, as between himself and Thomas Waine, make himself solely responsible for the payment of the same debt, and of the interest to accrue due thereon, from and after the decease of Thomas Waine; but *703] that Thomas Waine should be solely liable to pay *the interest on the mortgage debt during his life, and that the defendant should enter into a covenant with Joseph Waine and John Fowler, therein described as trustees nominated by Thomas Waine, for payment to them of 399*l.* within one calendar month after the decease of John Waine, in case Thomas Waine should die in the lifetime of John Waine, but not otherwise, in trust for the benefit of certain reputed children of Thomas Waine or such of them as should attain twenty-one, with benefit of survivorship among them, or, in the event of all dying under that age, then in trust for the brothers and sisters of Thomas Waine and the defendant, or such of them as should then be living, in equal shares; and that for carrying in part the agreement into effect such covenants should be entered into by the defendant and Thomas Waine respectively as were thereafter contained; and after reciting that in pursuance and part performance of the agreement the defendant had, by an indenture bearing even date but executed previously to the execution of the present indenture, covenanted with Joseph Waine and John Fowler for the payment to them in the event aforesaid of the sum of 399*l.* for the purposes aforesaid, It was witnessed that in pursuance of the agreement, and in consideration of the premises, and particularly of the covenants of the defendant, and also of the natural love and affection which Thomas Waine had towards his brother the defendant and towards his brothers and sisters thereafter respectively named, and for divers other good causes and considerations, Thomas Waine thereby directed and

appointed, and did grant, bargain, sell and confirm the premises unto the defendant and his heirs to the use of Richard Mullings and John Fowler, their executors, &c., for the term of 1000 *years from [*704 the decease of John Waine, upon the trusts thereafter declared, and from and after the determination of the term of 1000 years, and subject thereto, to the use of Thomas Waine and his assigns for his life, with remainder to the use of the defendant in fee. And it was thereby declared that the hereditaments were thereby limited to Richard Mullings and John Fowler, their executors, &c., for the term of 1000 years, upon trust, as soon as conveniently might be after the decease of John Waine, by demise or mortgage or the means therein mentioned, to raise 500*l.* for the benefit of the younger children of John Waine. This indenture contained a covenant by the defendant with Thomas Waine to the effect recited in the former, and a covenant by Thomas Waine with the defendant for payment of the interest.

By another indenture of the same date, the defendant covenanted with Joseph Waine and John Fowler, that, in case Thomas Waine should die in the lifetime of his father, he would, within one month after the decease of John Waine, pay them the 399*l.* with interest, to be held by them upon the trusts for the benefit of the reputed children of Thomas Waine, or in case of their death under twenty-one years, then in trust for the brothers and sisters of Thomas Waine and the defendant.

The indentures of the 16th June, and 2d July, 1849, were not enrolled under the statute.

On the 10th October, 1849, John Waine died.

By indenture of the 30th March, 1850, the mortgage term of 1000 years, limited by indenture of the 2d July, 1849, to the use of Richard Mullings and John Fowler, was conveyed to George Beak.

By indenture of 7th January, 1851, in consideration of the sums of 300*l.* and 200*l.* then due from Thomas *Waine to Isaac Beak, [*705 and of 100*l.* paid to him, Thomas Waine covenanted with Isaac Beak to pay the whole, and it was declared that the premises should stand charged with the same as well as with the 530*l.* secured by the previous indenture.

Thomas Waine made default in the payment of the 600*l.*

On the 29th October, 1851, by indenture, enrolled in Chancery on the 3d December, 1851, in consideration of 315*l.* paid by the plaintiff to Richard Bassett at the request of Thomas Waine for repurchase of the annuity of 25*l.*, Richard Bassett released the annuity; and in consideration of the above sum and 385*l.* further paid to Thomas Waine by the plaintiff, John Arnatt and E. T. Jones, at the request of Thomas Waine and by the direction of Richard Bassett, conveyed, and Thomas Waine, by virtue of the statute abolishing fines and recoveries, conveyed to the plaintiff in fee the premises, subject to the mortgage for 500*l.* if then subsisting, but discharged from the trusts of the indenture of the 29th October, 1847, subject to a proviso for redemption.

By indenture of the 29th November, 1852, endorsed on the last mortgage deed, the premises were charged by Thomas Waine as security for 100*l.* more advanced by the plaintiff to him.

At the respective times of the execution of the mortgage deeds of the 29th October, 1851, and 27th November, 1852, the plaintiff had no notice or knowledge that the entail in the premises had already been

barred, but was informed by Thomas Waine that the mortgage of the 9th June, 1817, was then vested in Bathe, and that upon the execution of that mortgage to him the principal money thereby secured had *706] increased to 540*l.*, *and he was informed by Thomas Waine, as the fact was, that the title deeds of the premises were then in the possession of the agent of Bathe, and the plaintiff had no notice or knowledge of any of the before-mentioned deeds except the mortgage deed of the 9th June, 1817, and the annuity deed of the 29th October, 1847, or that the premises were otherwise charged, or that Thomas Waine had borrowed any money from Isaac Beak. The defendant was no party to the dealings between the plaintiff and Thomas Waine, nor had the defendant any notice or knowledge of the plaintiff's mortgage.

By agreement of the 29th August, 1853, in consideration of 500*l.* paid to the executors of R. G. Bathe by the defendant at the request and by the direction of Thomas Waine, and of 200*l.* paid to Thomas Waine by the defendant and of an annuity to Thomas Waine for life, to the intent that the unexpired residue of the term of 400 years created by the indenture of the 9th June, 1817, might be merged and extinguished; Thomas Waine and those executors conveyed the premises (except a small portion) to the defendant in fee, on trust to pay Thomas Waine an annuity of 80*l.* for his life, and subject thereto to Frederick William Fowler for 99 years if Thomas Waine should so long live.

The two sums of 500*l.* and 200*l.* were in fact advanced to the defendant by Isaac Beak, and secured to him by an indenture of mortgage of the 5th September, 1853, by which the premises were charged with the payment of those sums, and with the above sums of 600*l.*, 530*l.*, 300*l.*, 200*l.*, and 100*l.*, making together 2430*l.*

When those respective sums were advanced by Isaac Beak to Thomas Waine and the defendant respectively, Isaac Beak had no notice or *707] knowledge of any mortgage *or other claim on the premises of the plaintiff, or those under whom he claims.

The several indentures of the 25th and 30th June and 2d July, 1849, were all parts of the same transaction, by which a certain agreement was carried out.

The defendant had not, previously to the execution of those indentures, or of those of the 30th March, 1850, and 29th August, 1853, nor in fact until the 8th March, 1855, any notice of the existence of the indenture of the 29th October, 1847, or of any mortgage, or encumbrance, or claim of the plaintiff upon the premises.

By indenture of the 27th March, 1855, Isaac Beak, in consideration of 2430*l.* paid to him by the defendant, his executors, &c., assigned the premises conveyed to him for 99 years by indenture of the 25th March, 1845, to the defendant for the residue of the term, upon trust to secure the payment of the mortgage debts of 300*l.* and 200*l.*, and subject thereto to the use of the defendant, his executors, &c., and Isaac Beak conveyed and released the premises in the indentures of 30th June, 1849, 7th January, 1851, and 5th September, 1853, and the reversions and remainders in fee expectant on the decease of Thomas Waine, or sooner determination of the term of 99 years, to the defendant in fee, in trust to secure the payment of the mortgage debts and the sums thereafter assigned, and subject thereto to his own use. And it was declared that Isaac Beak, his executors, &c., should stand possessed of

the premises in the indenture of the 30th March, 1850, for the residue of the term of 1000 years thereby assigned to him, upon trust to secure the mortgage debt of 530*l.*, and subject thereto in trust for the defendant in fee; and Isaac Beak assigned to Richard Mullings, his executors, &c., the *several mortgage debts of 300*l.*, 200*l.*, 600*l.*, 530*l.*, 100*l.* and 700*l.* respectively, in trust to dispose of the same as the [708 defendant, his heirs, or assigns, should direct, and in the meantime to attend the inheritance of the mortgaged premises, and protect from mesne encumbrances.

Thomas Waine died in January, 1858, without issue.

It was admitted that both the plaintiff and the defendant were purchasers from Thomas Waine the younger for value, and each without notice of the title of the other; so that neither had any equity against the other, and consequently the strict legal title must prevail.

There was another question in this case, on which no judgment was given, namely, whether the defendant was entitled to the protection of the term of 500 years created by the will of Thomas Waine the elder.

Mellish (*B. Hardy* with him), for the plaintiff.—The case depends on the construction of stat. 3 & 4 W. 4, c. 74, “for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance.” Sect. 38 enacts, “that when a tenant in tail of lands under a settlement shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards under this Act, by any assurance other than a lease not requiring enrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, *have the effect of confirming such voidable estate in the [709 lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this Act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this Act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this Act of confirming the same without such consent: Provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him.”

The question, which seems altogether new, is, whether the deed of the 26th June, 1849, which was enrolled in Chancery, turning the estate tail of Thomas Waine the younger into an estate in fee simple by affirming the previous conveyance of a base fee, is to be considered as a “disposition” of the property within that Act, or whether the two other deeds of the 30th June, 1849, and 2d July, 1849, which were not enrolled, may be taken as part of that disposition. If all that was arranged between the parties had been done by one deed conveying the estate, the

defendant would have come within the proviso in the 38th section in favour of purchasers for value. But the word "disposition" means the deed alone which disentails the estate, and is enrolled in Chancery, and it is used in this sense throughout the Act. Thus sect. 3 enacts:—"In *710] case any person shall, after the 31st December, 1833, be liable *to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into or hereafter to be entered into, before the 1st January, 1834, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this Act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the 31st December, 1833, be subject and liable under such covenant or agreement to make or to procure to be made such a disposition under this Act as will effect all the purposes intended to be effected by such fine or recovery; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this Act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the 31st December, 1833, be subject and liable under such covenant or agreement, to make or procure to be made such a disposition under this Act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this Act; and in those cases where the purposes intended to be effected by such fine or recovery or any of them cannot be effected by any disposition under this Act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the 31st December, 1833, be liable under such covenant or agreement to execute or to procure to be executed some deed whereby the person intended to levy such fine or *711] *suffer such recovery shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this Act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this Act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this Act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered."

Sect. 15. "After the 31st December, 1833, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the

disposition, at the time of his making the same, and also as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail: saving always the rights of all persons in respect of estates prior to the estate tail in *respect of [*712 which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made."

Sect. 34. "If at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this Act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this Act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed."

Sect. 40. "Every disposition of lands under this Act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: Provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this Act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise *and whether supported by a valuable or meritorious consideration or not, shall [*713 be of any force at law or in equity under this Act, notwithstanding such disposition shall be made or evidenced by deed; and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed."

[He also referred to sect. 41, requiring enrolment.]

Previous to the statute a fine levied and common recovery suffered by a tenant in tail let in all the preceding encumbrances created by him on the estate; and it seems there was no exception of the case where the fine was levied and the recovery suffered for the benefit of a purchaser for valuable consideration: 5 Cruise's Digest, tit. 36, ch. 9, §§ 2, 4, 6, 4th ed., with the cases there cited of *Goddard v. Complin*, 1 Ch. C. 119, *Cheney v. Hall*, Ambl. 526, and *Goodright d. Tyrrell v. Mead*, 3 Burr. 1703. To meet this sect. 38 was inserted in the Act. It does not, however, say that the disposition shall be made in favour of a purchaser, but "to a purchaser;" besides which, here the disposition is made to the tenant in tail himself. Instruments are often not enrolled because persons are desirous of keeping things secret.

Lush (*Bevir* with him), *contra*.—First. It is true that this point is a

novel one. Before the statute an estate tail was barrable by a fine, and the estates in remainder by a recovery, but each was only part of a process to pass the estate from the tenant in tail, and a deed was *714] *commonly executed to lead or declare the uses to which the process should enure. The fine and recovery were matters of record, and therefore purchasers could buy with safety if they found that the estate tail was barred; but the deed never was entered on record, and consequently the public could not know into whose hands the property passed. The statute follows the principle of the old law, and while it changed the mode of conveying an estate tail to a simple conveyance, intended that the public should have the same protection as formerly. But the statute made one material alteration. Under the former practice the fine or recovery confirmed all former dispositions of the lands made by the tenant in tail to a purchaser, whether he had or had not given value: 5 Jarm. Convey. 209, 3d ed., and the cases there referred to. That was felt a hardship and an anomaly, and the statute removing it ought to receive a liberal, not a limited construction.

It may be conceded that a conveyance executed by a tenant in tail to himself or to his own use is a disposition under this Act: 1 Hayes Conv. 160, 5th ed.; for if the words in the concluding proviso of sect. 38 are to be taken in their literal sense, no disposition under the Act could be made to a trustee. There is no reason here for saying that the enrolment of the deeds of the 30th June, 1849, and 2d July, 1849, was necessary to make them part of the disposition, and even the other side do not contend that *all* the deeds should be enrolled. It has been a well-known principle, almost ever since the Statute of Uses, that the deeds have the same efficacy, whether the deed executing a power is or is not simultaneous with the deed creating the power. Under the old *715] practice, where there was no deed to lead *the uses, a deed to declare them might be executed at any time, which would have relation back to the fine and recovery, however ancient, unless some change had taken place in the mean time: 4 Cruise's Dig., tit. 32, ch. 12, s. 17, *Deed*, p. 125, 4th ed.; and when there was no deed at all there was a resulting use to the benefit of the party conveying: 1 Hayes Conv. 41, 5th ed. Sects. 40 and 41 speak of the disposition under the Act as an assurance. The latter gives the parties six calendar months to enrol, and sect. 74 enacts, "That every deed required to be enrolled in his Majesty's High Court of Chancery in England or Ireland, by which lands, or money subject to be invested in, the purchase of lands, shall be disposed of under this Act, shall, when enrolled as required by this Act, operate and take effect in the same manner as it would have done if the enrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly enrolled under this Act, if such subsequent deed shall be first enrolled."

Mellish, in reply.—It is true that "disposition" in sect. 41 means the assurance by which any disposition of land shall be effected under the act; and it ought to have the same signification in sect. 38. The other deeds do not take effect under the statute at all, but by force of the common law.

COCKBURN, C. J.—Our judgment is for the defendant, on the ground

that here was a disposition of the estate to him as a purchaser for value. At first, I own I felt disposed to take a different view of the construction of *the 38th section of the Act for the abolition of fines and recoveries, 3 & 4 W. 4, c. 74, on which this question arises. [*716 Sect. 41 of that Act requires that every assurance which contains a disposition to convert a fee tail into a fee simple must be enrolled; and the term "disposition" appeared to me at first as involving a conversion of the estate into a fee simple, and so as to pass such an estate to the person to whom the disposition is made, whence it seemed to follow that the 38th section required it to appear on the deed enrolled who was the person to whom the new estate in fee simple had been passed. But on more consideration of the matter, although I am not quite free from doubt, my opinion became changed. Mr. *Lush*'s lucid argument has gone far to satisfy me that the design of the statute was to substitute this new form of conveyance for the old one by fine and recovery; and whereas under that you might convert an estate in tail into an estate in fee, and vest it in the prior tenant in tail, and by deed declare the uses to which it should enure, so all that was intended here was to substitute a more simple mode of assurance, which in order to be effective must be enrolled within six calendar months. When we come to deal with sect. 38, we find the intention was of a different kind.

According to the old law, where an estate already conveyed away by a voidable conveyance, or on which was an encumbrance, was disentailed by fine and recovery, that proceeding, though intended for different, or even adverse purposes, had the effect of setting up the prior conveyance or encumbrance against a person who gave value to the tenant in tail in order to get the estate conveyed to himself. That was a great hardship on persons in that condition, and the Legislature in this [*717 *statute intended to place that part of the law on a different footing, and to provide that when a disentailed estate was transferred, the disentailing deed should no longer operate, as before, in favour of a person who had a prior voidable conveyance of it, or a prior charge upon it. Such being the intention, I cannot help thinking that we must read the term "disposition" in sect. 38 thus. Supposing it does not appear on the deed enrolled in Chancery that the estate has been disentailed with a view to make a title to some particular purchaser for value, and nothing more appears than that there is a disentailing deed, that is enough to give him the rights which sect. 38 meant to secure to the purchaser, even though the deed should stop short of showing that any estate passed to him for value. And I form this opinion partly on what has been said by Mr. *Lush* with reference to the old form of proceeding, and partly in order to give a large construction to sect. 38, so as to make it co-extensive with what must be taken to have been the intention of the Legislature,—to do what equity and justice require. The person who has the prior voidable conveyance is in no worse position than before. As regards himself and the tenant in tail, he has taken a voidable conveyance, and cannot call on the tenant in tail to make his position better. If the tenant in tail disentails, then, as between them, the prior encumbrancer has a right in justice and equity to have the conveyance of the estate enure to his benefit. But the person ignorant of the prior voidable conveyance has a right to have the estate disentailed for his benefit.

Looking therefore to what I must take the Legislature contemplated here, I think we should be adhering too closely to the words of the *718] statute if we adopted the *argument of Mr. *Mellish*, however ingeniously put, that "disposition," in sect. 38, means the deed by which the disentailing of the estate takes place. I think we shall give effect to the intention of the Legislature by holding that, when the disposition is for the benefit of the purchaser for value, it is enough if the disentailing deed is enrolled in Chancery. So here, as there can be no doubt the disposition of this estate by which it was converted into a fee simple was for the benefit of the purchaser, he is entitled to the protection of the proviso in the 38th section.

BLACKBURN, J.—The 15th section of the 3 & 4 W. 4, c. 74, enacts [His Lordship read it]. That is the disposition meant by the statute, i. e. a disposing of the estate tail and the estates subsequent to it. The 38th section enacts that when the tenant in tail shall have created a voidable estate in favour of a purchaser for value, and shall afterwards make a disposition of the lands under that Act, it shall enure to confirm such voidable estate against all persons except those whose rights are saved by the Act: provided "the protector"—a novelty in the law—of the settlement shall consent to the disposition. That was repeating the old law as to fines and recoveries, except that there was a saving. The old law was, that when there was a voidable estate created by tenant in tail, a fine levied and recovery suffered by him confirmed the voidable estate as against the purpose of the disentailment. The Legislature rightly considered that that was hard. Of the two parties, which ought to suffer? The general rule is, that a purchaser for value, if he can get the legal estate, has a good equity against a prior purchaser, and I *719] think the person who took the first conveyance, which *he knew was of a voidable estate, was the least to be favoured of the two. Therefore the Legislature, thinking it hard that the subsequent purchaser, who had obtained a disentailing estate in his favour, should be postponed, their object in this Act was, not to create a register of titles, but to remove the hardship upon him. With this view, they have said at the end of the 38th section, "Provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him."

The argument of Mr. *Mellish* is that, where the disposition is for the benefit of a purchaser for value, the assurance, which must be enrolled within six calendar months, must be to that person himself. But this is neither the meaning of the words used, nor the object of the Legislature. They meant that when there is to be a disposition of the lands, and the purchaser has paid a price to the tenant in tail to break the entail, it is to be good unless the purchaser had express notice of the voidable estate. I do not feel the force of Mr. *Mellish's* argument that *he disentailing deed alone does not give notice of the disposition to those who inspect it. To future purchasers that notice would be very material, but there is no object that I can see in saying that it shall or shall not make good a disposition according as the purchaser had notice of the former estate, or a valuable consideration had been given by the purchaser. Then sect. 41 does not seem to me to touch the matter. The

disposition of the land is to be by some assurance, and it is sufficient if enough of that assurance is *registered to give effect to the Act: [*720 *i. e.* to bar those claiming under the estate tail the owner of it disposes of the lands to a purchaser for value, which purchase may have its effect at common law without the aid of the statute.

I quite agree that if a party disentails an estate and then keeps or sells it, it might be different—the purchaser for value must be a party to the act of disentailing.

The plaintiff in the present case has therefore no legal estate under any view of the question.

MELLOR, J.—The statute is intended to substitute a more simple mode of assurance for fines and recoveries, and also to limit the effect of the conveyance which is to be the substitute for them. The effect of the section under consideration is what the Lord Chief Justice and my brother Blackburn have described, that this enables a person without fine or recovery, but by single conveyance, either to enlarge the estate or convey it in trust for himself. If he does that the effect is the same as under the old law. But if a disposition is made to a purchaser for value, without notice of any assurance made previous to the sale of the estate, he is protected by the proviso in sect. 38 against the effect of that assurance, if, as my brother Blackburn says, he is purchaser of the disposition which is to change the estate tail into a fee simple. This may be done by one deed, but if so that one deed must, by sect. 41, be enrolled within six calendar months. But I cannot see why it may not be done by two or more deeds, and this for the reason given by Mr. *Lush*, *e. g.*, to enable the party to mortgage or make a settlement.

*SHEE, J.—I was under some considerable doubt as to the effect of the word “disposition” in this statute, and thought it [*721 must be understood to mean something done in favour of some other person than the party barring the entail. But now, from what has been said by the other members of the Court, from the argument of Mr. *Lush*, and what he brought to our notice relative to the practice before fines and recoveries were abolished, I agree with the rest of the Court.

Judgment for the defendant.

REGULA GENERALIS.

TRINITY TERM, 1864.

It is ordered, that, from and after the last day of this present Trinity Term, the following fees may be taken by the sheriffs, under-sheriffs, deputy sheriffs, sheriffs' agents, bailiffs, and others, the officers or ministers of sheriffs in England and Wales, pursuant to the statute of 1st Victoria, c. 55, intituled "An Act for better regulating the fees payable to sheriffs upon the execution of civil process."

£ s. d.

By sheriff for attending in Court on the trial of every common jury cause or issue, from the party who entered the same for trial, the sum of	0 10 6
For attending in Court on the trial of every cause or issue tried by a special jury summoned by precept, under the 108th section of the Common Law Procedure Act, 1852, from the party at whose instance the same was so tried, the sum of	1 1 0

A. E. COCKBURN

G. BRAMWELL

W. ERLE

W. F. CHANNELL

FRED. POLLOCK

COLIN BLACKBURN

SAMUEL MARTIN

J. S. WILLES

CHARLES CROMPTON

J. B. BYLES.

*722]

*MEMORANDUM.

Saturday, May 27. COCKBURN, C. J., said that he had received a memorial from the Serjeants at law not having patents of precedence, praying that they might be accommodated with seats within the Bar during Term; and, looking to their rank and position, and to the fact that on all other occasions except in Term they were so accommodated in this Court, and that in some other Courts they were so at all times, the Court had great pleasure in acceding to the application: it did not affect the order of precedence.

END OF TRINITY TERM.

TRINITY VACATION, 27 VICT. 1864.

CHAMBERS v. THE MANCHESTER AND MILFORD Railway Company. *June 22.*

[Reported, ante, p. 588.]

MORGAN v. THE VALE OF NEATH Railway Company. *July 4.*

[Reported, ante, p. 570.]

IN THE EXCHEQUER CHAMBER.

ASHPITEL, Executor of JAMES PETO, v. BRYAN. *June 14.*

Estoppel.—Bill of exchange.—Acceptor.—Denial of endorsement.—Account stated.

Declaration by the executor of B. upon a bill of exchange purporting to be drawn by A. and accepted by the defendant, and endorsed by A. to B.; with a count upon accounts stated. Plea, that A. did not endorse the bill. It appeared that A., who was possessed of goods, being the stock in trade upon his premises, died intestate, and indebted to the defendant and other persons; and it was arranged between B. and the defendant, who were two of his next of kin, that the defendant should take possession of the goods and accept a bill of exchange for their value, purporting to be drawn and endorsed by A. The goods were accordingly delivered to the defendant, and the bill declared upon was drawn and endorsed to the plaintiff by procuration in the name of A., and accepted by the defendant.

1. Held, affirming the judgment of the Queen's Bench, that the defendant could not be allowed to set up as a defence to the action that the bill was not endorsed by A.

2. *Semble.* That the bill was evidence of an account stated.

*THE Court below having discharged a rule to enter a verdict [*724 for the defendant upon certain terms (see 3 B. & S. 474, 494), in pursuance of those terms the defendant appealed from the decision of the Court below, and all the pleadings, except the pleas denying the endorsement of the bill and the accounts stated and the issues raised thereon, were struck out.

Rochfort Clarke, for the defendant.—Collins, who was clerk of John Peto, deceased, intending to act as his representative, sold and delivered his goods to the defendant before the drawing of the bill, its acceptance by the defendant, and endorsement to James Peto; and the defendant is liable to the administrator of James Peto for the value of those goods. The Court below treated James Peto as in possession of the goods, and considered that his position was altered by the giving of the bill; but

the jury found that the bill was given for goods of John Peto belonging to him, and for no other consideration, and by that finding negatived that the position of James Peto was altered by the giving of the bill. The jury also found that James Peto had no actual control or possession of the goods, though he affected to deal with them; and, therefore, there was no consideration for the agreement between him and the defendant that the bill should be drawn and endorsed in the name of John Peto. Nor did James Peto ever make himself executor de son tort. Consequently the defendant is not estopped from saying that the endorsement was not the endorsement of John Peto: *Mountford v. Gibson*, 4 East 441. In *Nelson v. Serle*, in error, 4 M. & W. 795,—where, to a declaration on a promissory note for 24*l.* made by the defendant, *725] payable twelve months after date, to *the plaintiff, the defendant pleaded that J. W. before and at his death was indebted to the plaintiff in 24*l.* for goods sold, which sum was due to the plaintiff at the time of the making of the promissory note; that the plaintiff, after the death of J. W., applied to the defendant for payment; whereupon, in compliance with his request, the defendant, after the death of J. W., for and in respect of the debt so remaining due to the plaintiff, and for no other consideration, made and delivered the note to the plaintiff, and that J. W. died intestate, and that, at the time of the making and delivery of the note, no administration had been granted of his effects, nor was there any executor of his estate, nor any person liable for the debt so remaining due to the plaintiff, and that there never was any consideration for the note except as aforesaid; it was held, that the plea was an answer to the declaration. [WILLES, J.—In that case, there being no administrator in existence at the time, there was no forbearance; if there had been, the decision would have been otherwise. If James Peto had taken out administration he would, in equity, have been prevented from suing during the sixty days for which the bill had to run. In *Gibson v. Minet*, 1 H. Bl. 549, in the House of Lords, it was decided that if a bill of exchange be drawn in favour of a fictitious person, and the name of the payee be endorsed on it by the drawer, which fictitious endorsement purports to be to the drawer himself or his order, and the acceptor, at the time of accepting the bill, knew those facts, he shall not take advantage of his own wrong, but a bonâ fide holder may recover against him.] This is not the endorsement of a fictitious person as in *Gibson v. Minet*, but a fictitious bill, and therefore *726] void; and in *that case there was judgment for the plaintiffs, who were endorsees, on the fifth count, which was on a bill payable to the bearer, on the ground that they were bonâ fide holders for value ignorant of the facts. (He cited per Hotham and Perryn, BB., pp. 586, 590.) [WILLES, J.—In the minds of the parties to the transaction this bill was endorsed by John Peto.] It was not a bill of exchange or negotiable instrument in the hands of James Peto. [BRAMWELL, B.—Suppose A. and B. for value agree that a bill shall be drawn and endorsed by John Smith, and a bill is drawn and endorsed accordingly, in an action on the bill the drawing and endorsement could not be traversed by either.] That fact, if stated in the declaration as an estoppel, might entitle the plaintiff to succeed, but where the estoppel should be pleaded on the record and is not, the jury ought not to find contrary to the truth: *Vooght v. Winch*, 2 B. & A. 662, 668, per

Abbott, C. J., *Bowman v. Taylor*, 2 A. & E. 278 (E. C. L. R. vol. 29). [WILLES, J.—In the latter case there was an estoppel by deed.] In *Pickard v. Sears*, 6 A. & E. 469, 474 (E. C. L. R. vol. 33), (a) it is laid down as the rule of law that “Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;” but that doctrine does not apply where both parties knew the real facts of the transaction, and there was no deception. [He cited *Barlow v. Bishop*, 3 Esp. 266, 1 East 432; *Smith v. Marsack*, 6 C. B. 486, 502 (E. C. L. R. vol. 56); *Pitt v. *Chapelow*, 8 M. & W. 616; *Drayton v. Dale*, 2 B. & C. 293 (E. C. L. R. vol. 9); *Sanderson v. Collman*, 4 M. & Gr. 209 [*727 (E. C. L. R. vol. 48), in most of which the estoppel was pleaded.] In *Swan v. The North British Australasian Company*, 7 H. & N. 608, Martin, B., said, p. 625, “The point is not open upon these pleadings: the defendants should have pleaded the estoppel;” and it is stated, *Id.* note (d), that the plaintiff’s counsel then consented that the Court should decide the point irrespective of the pleadings. [POLLOCK, C. B.—Estoppel may arise without any mistake or misleading, as by matter of recital in a deed executed by two parties. So here, for the purposes of the transaction in question, the parties agreed that certain facts should be admitted to be facts as the basis on which they would contract, and they cannot recede from that. If a person agrees, for the purposes of a particular arrangement, that a house shall be taken to be a certain value, he cannot afterwards dispute that, and is bound by it unless there has been fraud.] In the case of a recital in a deed, if the plea takes issue on the recital the jury must find according to the fact. [WILLES, J.—Then the Court would give judgment non obstante verdicto. CHANNELL, B.—The acceptance of the bill is a promise to pay some person, dead or alive, and the letters promising payment of the amount are evidence of an account stated.] There was no debt due from the defendant to James Peto, and the bill was without consideration.

Hayes, Serjt. (*J. C. Mathew* with him), for the plaintiff, was not called upon.

POLLOCK, C. B.—The answer to the last remark of Mr. *Rochfort Clarke* is furnished by the statement in *the case that after the death of John Peto the defendant agreed to the proposal of [*728 James Peto that he should take the stock of the deceased John Peto, and that the defendant used the goods and had the whole benefit of them; so that the transaction was in the nature of a sale of the goods in question from James Peto to the defendant; therefore there was a valuable consideration for the agreement between them; and the transaction was perfectly fair and reasonable. We all agree with the Court below that there may arise an estoppel by agreement, and that such an estoppel arises here. The parties agreed that the transaction should have this character, viz., that the defendant should appear to have bought the goods of John Peto, and that therefore the bill should be drawn and endorsed in the name of John Peto, and it was afterwards accepted by the defendant on the basis of that agreement. The defendant having ac-

(a) See this rule explained by Parke, B., when delivering the judgment of the Court of Exchequer in *Freeman v. Cooke*, 2 Exch. 654.

cepted the bill after it had been drawn and endorsed in that name, and having promised payment of it, now says that it was not drawn and endorsed by John Peto; but he is estopped from doing so.

As to the point suggested by my brother Channell on the count on the account stated; the bill itself not being objectionable for want of a stamp is admissible as evidence of an account stated; and the case states repeated promises of the plaintiff to pay the amount. That also is a good ground for our judgment in favour of the plaintiff.

WILLIAMS and WILLES, JJ., and BRAMWELL and CHANNELL, BB., concurred. Judgment affirmed.

*729] *CLAPHAM v. LANGTON. June 21.

Marine insurance.—Voyage policy.—Seaworthiness.—Parol evidence.

Declaration on a policy of insurance on a ship called The Kniar Borantinsky, "at and from the Tyne to Odessa or another port in the Black Sea," the length, breadth, draught and tonnage whereof were specified in a memorandum on the face of the policy at the time of making the policy. Plea, unseaworthiness, on which issue was joined. On the trial it appeared that, before the execution of the policy, the plaintiff wrote letters to the defendant describing the dimensions, &c., of the ship, and stating that she was a new iron steamer, and took no cargo, but only coals enough for her use to Gibraltar, where she would coal again. The dimensions of the ship were also stated in a memorandum on the policy. The ship was intended, after accomplishing the voyage, to be employed in river navigation only, and was, as to her hull, built and adapted to such navigation exclusively, and could not by any strengthening appliances be rendered fit to encounter the ordinary perils of the voyage; but before commencing the voyage certain appliances were put into and upon her hull to assist her in encountering the perils of the voyage. The Judge directed the jury that if the plaintiff had, before the execution of the policy, brought to the knowledge of the defendant the nature and description of the vessel, and the more than ordinary risk that such a vessel would necessarily encounter on the voyage, and if the vessel at the time of commencing the voyage had been by the strengthening appliances made as seaworthy as a vessel of such a nature and description could reasonably be made, they should find for the plaintiff. The jury having found for the plaintiff:

1. Held, that the direction was right, for that the warranty of seaworthiness was limited to the capacity of the vessel, and therefore was satisfied.

2. *Quære*, whether parol evidence as to the character of the vessel was admissible to qualify the ordinary warranty of seaworthiness.

BILL of exceptions.

The declaration stated that the plaintiff made a policy of assurance "lost or not lost at and from the Tyne to Odessa or another port in the Black Sea," upon goods and merchandise, and also upon the ship called The Kniar Borantinsky, "the length, breadth, draught, and tonnage whereof were specified in a memorandum made on the face of the said policy at the time of the making of the said policy," for the sum of 13,000*l.*; the consideration for the assurance being at the rate of 2*l.* 5*s.* per cent. It then averred an average loss or damage to the ship
*730] above 3*l.* per cent. by perils of the sea, and that *the ship was disabled from prosecuting her voyage without being repaired, and by reason of the premises the assured incurred great charges, whereby the defendant was liable to pay the rateable proportion thereof; and all things had happened to entitle the assured to have the benefit of the assurance, and that the assured sustained a general average loss of 5*l.* per cent.: yet the defendant had not paid the same. There

were also a count for money paid, money received, and on accounts stated.

First plea to the first count. That at the time of the commencement of the voyage from the Tyne the ship was not seaworthy for the voyage.

Second plea to the first count, so far as related to the claim in respect of the average loss or damage alleged to be above 3*l.* per cent.; that it was under 3*l.* per cent., and was not general, and that the ship was not stranded, and that the total average loss, other than general, did not amount to the 3*l.* per cent.

Third plea to the second count. Never indebted.

Issues thereon.

On the trial before Cockburn, C. J., at the Sittings at Guildhall after Trinity Term, the plaintiff gave in evidence, that before the making and subscribing of the policy he wrote to the defendant a letter, dated the 27th June, 1859, of which the following is an extract:—"Please hand the quotation for covering a new iron steamer hence to Odessa or another port in the Black Sea, including collision clause. She is of the following dimensions:—200 feet long, 30 feet beam, 5½ feet deep; engines of 100 horse power (with paddles); built by Messrs. Robert Stephenson & Co. She will have two masts, with fore and aft sails and yard, with a square sail. Her gross register tonnage will be about 400 tons; [*731 *will have a British crew to take her out; takes no cargo, and only coals enough for ship's use to Gibraltar, where she will coal again; value 13,000*l.*; steams out." On July 1st he wrote to the defendant stating the dimensions more exactly, and on the 5th July he wrote again, stating that it might be put in the policy that the ship was warranted to sail before the 1st of August, and that he wished a trial trip to sea for a few hours before that time to be covered, and that it should be put in the policy; that she was of the following dimensions:—"Length, 200 feet; breadth, 32.35; draught of water about 3 feet; tonnage 404 tons:" as it was thought that the policy would not be complete without that detailed description. On the 6th July the defendant subscribed the policy, and by a memorandum in the margin, on the face of it, which was made at the time of the making of the policy, and formed part thereof, it was expressed that the length of the vessel was 200 feet; her breadth, 32.35 feet; draught about 3 feet; tonnage, 404, and that she was warranted to sail for Odessa on or before the 1st August, 1859.

The plaintiff further gave in evidence that the vessel corresponded with the description contained in the policy and in the letters, and that she was intended after accomplishing the voyage insured to be used in river navigation only, and was, as to her hull, built and adapted for such river navigation exclusively, and, in respect of the hull, could not by any strengthening appliances to it be rendered fit to encounter the ordinary perils of the voyage insured. That the descriptions and dimensions of the vessel contained in the policy were sufficient to convey to the knowledge of any competent person acquainted with shipping that the *vessel was not built for ocean navigation and was not an [*732 ordinary sea-going vessel.

The plaintiff further gave in evidence that before the commencing of the insured voyage, and whilst the vessel was in the Tyne, certain strengthening appliances were put into and upon the hull of the vessel in order to assist her in encountering the perils of the voyage, and those

appliances were reasonably proper and sufficient for such purpose, according to the then knowledge and practice of naval architects, and that by means thereof the vessel was rendered as seaworthy for the voyage as a vessel of such build, construction and capacity was capable of being made. That the vessel commenced the voyage on the 29th July, 1859, with the hull so strengthened, but that nevertheless she was not then, in respect of her hull, fit to encounter the ordinary perils of the voyage; and that after leaving the Tyne, and in the course of the voyage, she suffered certain damages from perils of the sea, and on the 6th August, 1859, put into the port of Falmouth, and was there repaired and further strengthened.

The defendant adduced evidence to prove that the strengthening appliances put into and upon the hull of the vessel, in order to assist in encountering the perils of the voyage, were not reasonably proper or sufficient for such purpose, according to the then knowledge and practice of naval architects, but that other and much better appliances for such purpose, then well known and practised by naval architects, might reasonably have been put upon the hull before the commencing of the voyage, and that the vessel was not, by means of the appliances put into and upon the hull, rendered as seaworthy for the voyage as a vessel of such build, construction and capacity was capable of being made.

*733] *The Lord Chief Justice directed the jury, with respect to the first issue, that if in their opinion the plaintiff had, before the execution of the policy, brought to the knowledge of the defendant the nature and description of the vessel intended to be insured, and the more than ordinary risk that such a vessel would necessarily encounter on the voyage insured, and if in their opinion the vessel at the time of commencing the insured voyage had been and was, by the strengthening appliances put into and upon her hull, made as seaworthy for the insured voyage as a vessel of such a nature and description could reasonably be made, they should find a verdict for the plaintiff on that issue.

Whereupon the counsel for the defendant excepted that the Lord Chief Justice ought to have directed the jury that, inasmuch as it was proved that at the time of commencing the insured voyage the vessel was not, in respect of the hull thereof, fit to encounter the ordinary perils of the insured voyage, they ought to find a verdict for the defendant on that issue.

The jury found a verdict for the plaintiff.

The case was argued, June 14 and 15; before POLLOCK, C. B., WILLIAMS and WILLES, JJ., and BRAMWELL and CHANNELL, BB.

Mellish (*Vernon Lushington* with him), for the defendant.—The direction of the Lord Chief Justice was in accordance with the decision in *Burges v. Wickham*, 3 B. & S. 669 (E. C. L. R. vol. 113); but that decision is erroneous. In all voyage policies there is an implied warranty of seaworthiness: 1 Arnould on Insurance, p. 689, 2d ed. The statement of the dimensions of the vessel in the memorandum on the *734] policy does not affect the warranty; *nor is it material that the underwriter was informed that the vessel was intended for river navigation. It is not necessary to communicate to the underwriter any information which tends to show that the vessel is probably unseaworthy: *Haywood v. Rodgers*, 4 East 590, 597, per Lord Ellenborough; nor is the underwriter bound to attend to the description of the vessel

in the policy; he relies upon the warranty. [POLLOCK, C. B.—Suppose the shipowner says, “I cannot tell whether the ship is seaworthy or not; I give you all particulars relating to her: judge for yourself.” It would certainly be more simple and clear, and more in accordance with the accustomed mode of doing business, to put in the few words “seaworthiness not warranted,” but that does not decide the question.] If the warranty varies with the extent of the communications made by the shipowner to the underwriter, the decision in each case will depend on the opinion of the jury, not on the construction of the written instrument. The warranty might be that the vessel was as seaworthy as it was capable of being made. The term “seaworthy” is indeed elastic, and to some extent has reference to different voyages, and in some respects to different vessels; but a vessel not fit to meet the ordinary perils of the voyage insured at the time of sailing on it, cannot be said to be seaworthy in any sense of the term. The general definitions of seaworthiness do not extend to such a case as the present. [He cited *Dixon v. Sadler*, 5 M. & W. 405, 414, (a) per Parke, B., delivering the judgment of the Court; *Biccard v. Shepherd*, 14 Moo. P. C. C. 471, 493–4, per Lord Wensleydale; *Bouillon v. Lupton*, 15 C. B. N. S. 113 (E. C. L. R. vol. 109). POLLOCK, C. B.—The dictum in *Dixon v. Sadler* has not much *bearing on this question, because that case depended on the warranty of seaworthiness differing at different parts of the voyage.] In *Knill v. Hooper*, 2 H. & N. 277, it was held that there was an implied warranty of seaworthiness in a voyage policy of insurance on salvage. [POLLOCK, C. B.—The rule is, that in policies of insurance a warranty of seaworthiness is generally to be implied, but if the evidence shows that it is not, the rule ceases. In *Gibson v. Small*, 4 H. L. Ca. 353, Lord Campbell said, p. 418, the term “seaworthy” means “that the ship is in a condition, in all respects, to render it reasonably safe where it happens to be at any particular time referred to, whether in a dock, in a harbour, in a river, or traversing the ocean.” BRAMWELL, B.—According to the argument for the defendant the warranty contradicts what the policy says of the vessel. The underwriter says a vessel of certain dimensions cannot be seaworthy, and therefore the vessel insured is not what in the policy she is described to be.] There is not necessarily a contradiction; a man may have thought she was seaworthy though he is mistaken. Persons of skill in the construction of ships may know that a vessel of certain specified dimensions is not seaworthy, but that may not be generally known, or at any rate not known to the underwriter.

F. A. Bosanquet (*Bovill* with him), for the plaintiff, was not called upon.

POLLOCK, C. B.—We all agree that the judgment of the Court below should be affirmed; but our reasons are not at present the same.

Cur. adv. vult.

WILLIAMS, J., delivered the judgment of the Court. *In this case the judgment of the Court below must be affirmed, for the reasons given in the opinions of all the members of the Court, in *Burges v. Wickham*, 3 B. & S. 669 (E. C. L. R. vol. 113), as to the meaning of the term “seaworthiness.”

Upon the other point, which was controverted by Blackburn, J., in

(a) Affirmed in error, 8 M. & W. 895.

that case, viz., whether parol evidence as to the character of the vessel is admissible to qualify the ordinary warranty of seaworthiness in a policy, we express no opinion. Judgment affirmed.

MORGAN v. The VALE OF NEATH Railway Company.
[Nov. 27, 1865.]

Master and servant.—Negligence of fellow-servant.—Liability of master.

M. was employed by a railway Company as their servant to do work as a carpenter to the roof of an engine shed at their station whilst the railway traffic was being carried on in it by their servants. In the course of this employment he was standing upon a scaffold which was erected near to one of the turntables. The porters of the Company who were engaged in shifting a locomotive engine allowed it to project so far beyond the turntable that, in turning it, the end of the engine, by their negligence, struck against a ladder which constituted one of the supports of the scaffold. The scaffold gave way in consequence, and the plaintiff was thrown off and injured. In an action by M. against the Company: Held, by the Exch. Ch., affirming the judgment of the Court below, that the nature of M.'s employment was such as to make him and the servants by whose negligence he suffered servants in a common employment, within the rule which exempts the employer from responsibility to his servant for the consequences of the negligence of a servant in a common employment.

THE plaintiff appealed from the decision of the Court below discharging a rule for setting aside a nonsuit. See ante, p. 570.

Macnamara (G. B. Hughes with him), for the plaintiff.—First. Recent cases in the House of Lords have decided that, in the absence *737] of personal negligence on *his own part, a master is not responsible for injuries sustained by one of his servants, through the negligence of a fellow-servant engaged in a common work or occupation. The ground of this exception to the liability of the master is, that the servant undertakes the service knowing that he is liable to injury from the negligence of those who are engaged with him in the common work or occupation: Bartonshill Coal Company, appts., Reid, respt., 3 Macq. 266, 276, 277, 284, per Lord Cranworth, C.; Bartonshill Coal Company, appts., McGuire, respt., 3 Macq. 300, 306, 307, 308, per Lord Chelmsford, C. In those cases, a miner in the employment of the appellants was killed by the negligence of the engineman in not stopping the engine in time, whereby the cage in which the miner was ascending the shaft of the mine was carried past the platform, up against the scaffolding. The House of Lords, reversing the decisions of the Court of Session in Scotland, held that the miner and engineman were engaged in a common work: the ground of the judgment in the former case is stated by Lord Cranworth, C., p. 295, "In the present case there appears to me to be no doubt but that Shearer," the engineman, "and the miners were engaged in a common work:" and in the latter case, Lord Chelmsford, C., p. 308, says, "It appears to me that the deceased and Shearer were engaged in one common operation, that of getting coals from the pit. The miners could not perform their part unless they were lowered to their work, nor could the end of their common labour be attained unless the coal which they got was raised to the pit's mouth; and of course, at the close of the day's work, the workmen must be lifted out of the *mine." [He also cited the judgment of Lord Brougham, Id., *738] p. 313.] In *McNaughton v. The Caledonian Railway Company*,

19 Court of Sess. Ca. 271, the plaintiff's husband, while employed as a joiner or carpenter in repairing a railway carriage on a siding, was killed by an engine being driven suddenly into the siding, through the negligence of the defendant's servants who were in charge of the engine, and who arranged the switches, and the defendants were held liable by the Lord Ordinary, and in *Bartonshill Coal Company, appts., McGuire, respt.*, 3 Macq. 300, 311, Lord Chelmsford, C., said that decision might be sustained without conflicting with the English authorities.

Secondly. The plaintiff was not engaged in a common work or occupation with the railway porters who caused the accident. They were not associated together for a common object, but were acting independently of each other; the plaintiff would know nothing about the risks from the turntable, or the duties of the porters, and it is not shown that he knew that it was going to be used on the occasion when the accident happened. Carpenters in the employment of the defendants have nothing to do with attending on passengers and their luggage, or the removal or coupling of carriages, trucks, or engines at the station. [POLLOCK, C. B.—That observation would apply in the case of workmen employed in building a house. Suppose a plumber on the roof negligently causes injury to a man employed in passing through the hall?] The case supposed is like *Wiggett v. Fox*, 11 Exch. 832. Community of work and community of employment are distinct matters. [PIGOTT, B.—Would it make any difference if the plaintiff had been engaged in mending the turntable?] No. *Priestley v. Fowler*, 3 M. & W. 1, *is treated by Lord Cranworth, C., in *The Bartonshill Coal Com-* [*739
pany, appts., Reid, respt., 3 Macq. 266, 284–5, and by Lord Chelmsford, C., in *Bartonshill Coal Company, appts., McGuire, respt., Id.* 300, 307, as an instance of persons employed in a common work, and the judgment, 3 M. & W. 7, proceeded to some extent on the ground of the plaintiff knowing or having opportunity of knowing that the van was overloaded. *Hutchinson v. The York, Newcastle and Berwick Railway Company*, 5 Exch. 343, and *Waller v. The South Eastern Railway Company*, 2 H. & C. 102, in deference to which Cockburn, C. J., concurred in discharging the rule in the Court below, are distinguishable. [POLLOCK, C. B.—The judgment of Cockburn, C. J., makes no distinction between a carpenter sent for on a particular occasion and a carpenter in the regular employment of the Company.] In *Hutchinson v. The York, Newcastle and Berwick Railway Company*, 5 Exch. 343, a servant of the Company whose duty it was to travel by their train, probably a guard, was injured by the negligence of those driving the train, and they were engaged in a common object—the transit of the train—as also were the guard of the train and the platelayer in *Waller v. The South Eastern Railway Company*, 2 H. & C. 102, where the criterion given by Pollock, C. B., pp. 106, 109–110, and approved by Bramwell, B., p. 112, is, were the servants at the time of the accident engaged in one common object? [BRAMWELL, B.—But does not that mean a common immediate employment?] Yes. In *Senior v. Ward*, 1 E. & E. 385 (E. C. L. R. vol. 102), Lord Campbell, in delivering the judgment of the Court, p. 391, said that according to the authorities collected and commented upon in *The Bartonshill Coal* *Company, appts., Reid, respt., 3 Macq. 266, “the action would [*740
not have been maintainable if the deceased had come to his death

purely from the negligence of his fellow-servants employed in the same work with him." [He also cited *Waller v. The South Eastern Railway Company*, 2 H. & C. 102, per Pollock, C. B., pp. 104-5, and *Holmes v. Clarke*, 6 H. & N. 349, (a) per Pollock, C. B., pp. 356-7.] In *Searle v. Lindsay*, 11 C. B. N. S. 429 (E. C. L. R. vol. 103), the third engineer of a steam vessel was injured in consequence of the negligence of the chief engineer, and Keating, J., said, p. 440, "It is also not unworthy of notice that the plaintiff himself was an engineer, and knew the danger of working the winch in its imperfect state." *Lovegrove v. The London, Brighton and South Coast Railway Company*, 16 C. B. N. S. 669 (E. C. L. R. vol. 111), was a case similar to that of the miner and engineman in *Bartonshill Coal Company*, appts., Reid, respt.: Erle, C. J., there said, pp. 687-8, it was clear that the platelayer whose negligence caused the damage "was a fellow-workman of the plaintiff, and that both were engaged in one common occupation." The decision of the Supreme Judicial Court of Massachusetts, in *Farwell v. The Boston and Worcester Railroad Corporation*, 4 Metcalf 49, is consistent with the contention of the plaintiff in the present case, though the judgment of Shaw, C. J., p. 60, (b) goes farther than was necessary for the decision. But the tendency of some of the judgments in the American Courts is to exempt the master in all cases from responsibility for injury to one servant by another, whereas in Scotland the tendency of the Courts is to hold the master liable in all cases. The English law steers the middle course between the two extremes.

*741] *Giffard* (J. W. Bowen with him), for the defendants, was not called upon.

ERLE, C. J.—I am of opinion that the judgment of the Court below should be affirmed. The plaintiff was in the employment of the railway Company, to do carpenter's work required by them on the line of railway, and the persons who caused the wrong were porters in the employment of the same Company, engaged in shifting a locomotive engine by means of a turntable, and they allowed the engine to project so far beyond the turntable that the end of it struck against and displaced a ladder which was one of the supports of the scaffold on which the plaintiff was standing, and he fell from it to the ground and received severe injuries. The plaintiff and the porters were engaged in a common employment and doing work for a common object, viz., fitting the line for traffic. In answer to the illustration put by my brother Pigott in the course of the argument, Mr. *Macnamara* admitted that it would make no difference if the plaintiff had been employed in doing carpenter's work on the turntable. The principle of the cases which have established that the master is not liable to his servant for damage caused by a fellow-workman, is put very clearly by Blackburn, J., in the course of his judgment, in the Court below, p. 580, "There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think

(a) Affirmed on appeal, 7 H. & N. 937

(b) Also printed in 3 Macq. 316.

that, whenever the *employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule." The cases are exceedingly numerous, and have been clearly examined in the argument of Mr. *Macnamara*, and I should not make the rule of law on this subject clearer by further examining any of them. I am of opinion that this case is within the above principle.

POLLOCK, C. B.—I will only add to the judgment which has been just delivered, that by a decision in favour of the plaintiff we should open a flood of litigation, the end of which no one could foresee. If a carpenter in the employment of a railway Company were distinguished from a porter in their employment so as to create a liability of the Company, every large mercantile or manufacturing establishment would be split up into different departments of labour. But in truth the workmen employed in such an establishment have all a common object, viz., to further the business of the establishment. We ought not to be too nice in defining a common object with reference to the rule which governs this class of cases, so as to make a master not liable unless there were a common immediate object in which the servant suffering and the servant doing the wrong were engaged.

WILLES, BYLES and KEATING, JJ., and BRAMWELL, CHANNELL and PIGOTT, BB., concurred. Judgment affirmed.

*OHRBY and Wife v. The RYDE COMMISSIONERS. [*743
July 4.

Public Commissioners.—Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, s. 52.—Fencing footpaths.—Action.—Funds.

1. The Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34, s. 52, imposes on the Commissioners under that Act an obligation to place fences on the footways for the protection of foot passengers.

2. Commissioners acting gratuitously in the discharge of a public trust are responsible, in an action for injury caused by a breach of duty on their part, without showing affirmatively that they are possessed of funds, or the means of raising funds, to meet any damages which may be recovered against them.

THE first count of the declaration alleged that the defendants were the Commissioners for the time being duly elected and acting under The Ryde Improvement Act, 1854; and the footway after mentioned was situate within the limits of the Act, and was then under the care, management and control of the defendants as such Commissioners; and the defendants then wrongfully suffered and permitted a certain footway in and being part of a public highway in the town of Ryde, and being above the highway, on the side of which footway and towards the highway a fence or post, or other like projection, was needed for the safety of passengers walking or passing on such footway to be, and the same footway was for a long time in a condition dangerous to foot passengers using or passing along the footway, to wit, by reason that the defendants had lowered a certain part of the highway below the level of the footway, and had wrongfully, negligently and contrary to the statute omitted, neglected and refused to place, and did not place, on the side of the

*744] *footway any fence or post or other protection whatever, and did not after daylight had ceased put any sufficient or proper light to warn persons lawfully passing in or along the footway after daylight had ceased of the dangerous and unprotected state thereof; whereby Mary Ohrby, then being the wife of the plaintiff, while lawfully using the footway after daylight had ceased, and without any default on her part, slipped and fell from and off the footway, to wit, into the highway below and thereby broke her leg, and suffered great pain, and became and was sick for a long time, and was permanently injured and lamed and rendered incapable of walking.

The second count set out various forms of special damage to the male plaintiff by reason of the premises in the first count.

Demurrer to both counts, and joinder in demurrer.

The case was argued, in Easter Term, on the 26th April; before COCKBURN, C. J., BLACKBURN, MELLOR and SHEE, JJ.

Pinder (Ledgard) with him, in support of the demurrer.—First. The declaration discloses no legal duty in the defendants to fence the footway. It is framed on The Ryde Improvement Act, 1854, 17 & 18 Vict. c. lxxxiii., sect. 43 of which enacts:—“ ‘The Lands Clauses Consolidation Act, 1845,’ ‘The Markets and Fairs Clauses Act, 1847,’ and ‘The Towns Improvement Clauses Act, 1847,’ except sect. 6 of such last-mentioned Act with respect to the appointment of an inspector, and so much of sects. 7 and 12 as relate to the approval by one of Her Majesty’s principal Secretaries of State of the appointment, salary, or removal of
*745] any officer, and except the proviso to *sect. 167 of the last-mentioned Act as to the proportion of rate on arable and pasture land, meadow ground, woodlands, market gardens, and nursery grounds, and except so much of sect. 63 of such last-mentioned Act as relates to the width of new streets, not being carriage roads, and so much of sect. 121 as relates to the approval by the Commissioners of Her Majesty’s Woods and Forests, land revenues, works, and buildings, and as relates to the local inquiry therein directed to be made, and ‘The Towns Police Clauses Act, 1847,’ except so much of the last-mentioned Act as relates to the appointment of constables, and except so much of the said several Acts as may be varied by this Act, shall be incorporated with and form part of this Act; and the first-mentioned Act shall be construed as if the expression ‘Commissioners’ had been contained in that Act, instead of the expression ‘promoters of the undertaking:’ Provided, always, that, except as herein expressly provided, nothing in ‘The Lands Clauses Consolidation Act, 1845,’ contained shall authorize or empower the Commissioners to purchase or take lands otherwise than by agreement.” And by sect. 44:—“Notwithstanding anything in ‘The Towns Improvement Clauses Act, 1847,’ contained, it shall be lawful for the owner of any land through which any public sewer to be hereafter constructed may pass to erect any building, not being a dwelling-house, on or over such sewer, so that such erection does not in any manner obstruct or interfere with such sewer.” The Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 84, thus embodied, enacts in its 49th section, that the Commissioners “shall be deemed guilty of a misdemeanour for refusing or neglecting to repair any public highway within
*746] the *limits of the special Act, &c.,” and in *Hartnall v. The Ryde Commissioners*, 4 B. & S. 361 (E. C. L. R. vol. 116), the

defendants here, it was held that the Commissioners were liable under that section for not repairing a footway. But the declaration in the present case is founded on the 52d section, which enacts:—"The Commissioners shall from time to time place such fences and posts on the side of the footways of the streets under their management as may be needed for the protection of passengers on such footways, and they may place posts in the carriage-ways of such streets, so as to make the crossing thereof less dangerous for foot passengers; and they shall from time to time repair any such fences or posts, or remove the same, or any obstructions to any such carriage-way or footway, as they think fit." This section is very differently worded from the former, for it vests a discretionary power in the Commissioners; and if so, *Metcalf v. Hetherington*, 11 Exch. 257, in error, 5 H. & N. 719, is an authority in their favour. [MELLOR, J., observed that that case has been much shaken. BLACKBURN, J., referred to *Gibbs v. The Trustees of the Liverpool Docks*, 3 H. & N. 164, and *Cockburn, C. J.*, to *Holliday v. The Vestry of St. Leonard's Shoreditch*, 11 C. B. N. S. 192 (E. C. L. R. vol. 103).] The statute has empowered the Commissioners to do many things which would be actionable in any one else; *e. g.* sect. 51 enables them to cause streets to be paved, &c., and the ground or soil thereof to be raised, lowered, or altered, &c. [BLACKBURN, J.—Yes. But it does not say that they are not bound to guard against those things being a nuisance to foot passengers.] [He referred to sect. 66 of the local Act.]

Secondly. The declaration should have shown that the *Com- [*747 missioners had funds at their disposal sufficient to enable them to erect these fences. It never could have been the intention of the Legislature that they should do it out of their own pockets.

Kingdon, contra.—First. The defendants are liable both at common law and under stat. 10 & 11 Vict. c. 34. With respect to the former, the rule is, that when a public body are required by statute to do a particular thing which must be a nuisance they are protected; but where the statute intrusts them with the performance of public duties, and they perform them in a negligent manner, from which damage ensues, they are liable to be sued: *Whitehouse v. Fellowes*, 10 C. B. N. S. 765 (E. C. L. R. vol. 100); *Clothier v. Webster*, 12 Id. 790. They are also liable under the latter. The management of streets is completely vested in the Commissioners by ss. 47, 48, 49; and s. 52, while it leaves in their discretion whether they will put posts or fences, renders it imperative on them to keep such in repair if they do put them. And were this even otherwise, the word "may" in an Act of Parliament is construed to mean "shall" when the Act is for the protection of the public.

Second. As to the objection that the declaration ought to have alleged that the Commissioners had funds: the case already referred to of *Hartnall v. The Ryde Commissioners*, 4 B. & S. 361 (E. C. L. R. vol. 116), is an authority against the defendants. [COCKBURN, C. J.—In *Duncan v. Findlater*, 6 Cl. & F. 894, Lord Cottenham, C., says, p. 907, "It is impossible to suppose that the framers of this statute" (1 & 2 W. 4, c. 43, The General Turnpike Act for Scotland), "contemplated [*748 *that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the trustees. If the thing done is within the statute, it is clear that no compensation can be afforded for any

damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption that the act creating the damage being within the statute must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by the statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct?" The mode in which the funds which the Commissioners are entitled to raise under the local Act are to be disposed of is provided for by sect. 115. [COCKBURN, C. J.—This is not one of them.] Sect. 117 enables the Commissioners to make a rate for general purposes. [SHER, J.—Sect. 97 comes very near:—"The Commissioners shall at all times for ever hereafter pay and make good to the owners and occupiers of any buildings, lands, or grounds, and to all other persons, all loss, costs, charges, sums of money, damages, and expenses whatsoever, and all injury, of what nature or kind soever, as well immediate as consequential, which such owners or occupiers or such other persons may sustain, pay, expend, or be put unto, or be subject or liable to sustain, pay, expend, or be put unto, by reason or in consequence of the bursting, leaking, failure, or insufficiency of any reservoir, embankment, watercourse, aqueduct, pipes, or other works, now or hereafter to be constructed *749] *by the Commissioners under the authority of this Act." The plaintiff is entitled to judgment on this record, although there may be no means under it of recovering the damages.

Pinder, in reply.—First. Sect. 107 of stat. 10 & 11 Vict. c. 34, enacts:—"Nothing in this Act contained shall be construed to render lawful any act or omission on the part of any person which is, or but for this Act would be, deemed to be a nuisance at common law, nor to exempt any person guilty of nuisance at common law from prosecution or action in respect thereof, according to the forms of proceeding at common law, nor from the consequences upon being convicted thereof." By the interpretation clause, sect. 3, "The word 'person' shall include a corporation, whether aggregate or sole." [He mentioned *Brine v. The Great Western Railway Company*, 2 B. & S. 420 (E. C. L. R. vol. 110).]

Secondly. *Hartnall v. The Ryde Commissioners*, 4 B. & S. 361 (E. C. L. R. vol. 116), is inapplicable, because there the trustees had no discretionary power vested in them. If the Legislature had intended that such actions as this might be brought, and in the event of the plaintiff obtaining judgment, further proceedings should be resorted to to recover the damages, they would have provided machinery for that purpose by *scire facias* or otherwise. *Cur. adv. vult.*

The judgment of the Court was now delivered by

MELLOR, J.—In this case it was contended on the argument of the *750] demurrer that the declaration did not *disclose a good cause of action against the defendants, the Ryde Commissioners, on the grounds; in the first place, that by the 52d section of the 10 & 11 Vict. c. 34 (incorporated into the Ryde local Act) an absolute discretion was vested in the Commissioners as to the fencing of the footways under their government; and in the second place, that the defendants being Commissioners acting gratuitously in the discharge of a public trust, could not be responsible in an action without showing affirmatively that they

were possessed of funds, or the means of raising funds, to meet any damages which might be recovered against them.

We think that neither of these objections ought to prevail. The Commissioners are not, in our opinion, invested with an absolute discretion as to whether they will place fences by the footways for the protection of foot passengers, but that it is their duty to do so. And if that be the true construction of the section, the record discloses a case of actual negligence and breach of duty on the part of the defendants themselves, and we think that under such circumstances we are bound by the decision of this Court in *Hartnall v. The Ryde Commissioners*, 4 B. & S. 361 (E. C. L. R. vol. 116), upon the construction of another section of this very statute, but which is exactly in point as to this objection. If that authority is to be questioned it must be in a Court of error, as we are bound by it and by the other authorities which were referred to on the argument.

There must therefore be judgment for the plaintiffs.

Judgment for the plaintiffs.(a)

(a) See *Coo v. Wise*, ante, p. 440.

*IN THE EXCHEQUER CHAMBER. [*751

LYON and Wife v. KNOWLES. June 14.

Dramatic Literary property.—3 & 4 W. 4, c. 15.—5 & 6 Vict. c. 45.—6 & 7 Vict. c. 68.—*Partnership.*

K., the licensed proprietor of a theatre, under stat. 6 & 7 Vict. c. 68, entered into an arrangement with D. whereby D. had the use of the theatre for dramatic entertainments. D. provided the company, had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. K., on his part, paid for printing and advertising, furnished the lighting, door-keepers, scene-shifters and supernumeraries, and hired the band, music being a necessary part of the performance. The money taken at the door was taken by servants of K., who retained one-half of the *gross* receipts as his remuneration for the use of the theatre, and handed the other half to D. Among the pieces represented were two which L. had the sole liberty of representing or causing to be represented, &c., as assignee of the author, under the Dramatic Literary Property Acts, 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45. Held, affirming the judgment of the Queen's Bench, that no action under those statutes was maintainable by L. against K., as the above facts did not show that those pieces had been represented, &c., by him, or that there was a partnership between D. and him so as to render him liable for the representation, &c., of them by D.

THE plaintiff having appealed against the judgment in this case (see the report, vol. 3, p. 556), the appeal was now heard before POLLOCK, C. B., WILLIAMS and WILLES, JJ., and BRAMWELL and CHANNELL, BB.

Hawkins, for the plaintiff, argued that the only question was whether there was evidence on which the jury might have found that the defendant represented, or caused to be represented, the dramatic piece in question. [He cited *Lacy v. Rhys*, 4 B. & S. 873 (E. C. L. R. vol. 116), and *Marsh v. Conquest*, 17 C. B. N. S. 418 (E. C. L. R. vol. 112). WILLIAMS, J.—The difference between *Marsh v. Conquest*, and the present case is, that there the actors were *the ac- [*752 tors of the defendant, who let them out for the night; here they were provided by Dillon.] The defendant here had more control

over the representation. His servants took the money at the door. *Russell v. Briant*, 8 C. B. 836 (E. C. L. R. vol. 65), which was relied on in the Court below, is distinguishable in this, that there the defendant only permitted the representation, here he superintended it; there the plaintiff paid a fixed rent for the room, here he and the defendant divided the profits.

Milward, for the defendant, was not called on.

THE COURT said the question was rather one of fact than of law. But so far as any question of law was involved they thought the defendant not liable. He took no part in the matter, and there was no evidence to show whether he did or did not know what particular pieces were represented. The judgment of the Court below must therefore be affirmed.

Judgment affirmed.

*753] *IN THE EXCHEQUER CHAMBER.

HOPKINS, Creditors' Assignee of the Estate of the Rev. A. W. GREGORY, a Bankrupt, v. CLARKE. June 16.

Ecclesiastical benefice.—Sequestration.—Bankruptcy.—Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 184.—Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 135.

On the 30th October, 1862, a sequestrari facias, at the instance of the defendant, a judgment-creditor of G., issued to the Bishop of W., and on the 31st, at 9.38 a. m., was lodged at the office of the Bishop's Registrar. On the 1st November a sequestration issued, which was published on the 2d. On the 31st October, G. petitioned for adjudication of bankruptcy against himself, and his petition was filed on the same day at 12.25 p. m.; on the 17th November the plaintiff was appointed creditors' assignee, and on the 9th January, 1863, applied for a sequestration, which issued on the 10th, and was published on the 18th. Held, affirming the judgment of the Queen's Bench,

1. That the profits of the benefice did not pass to the plaintiff under The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, until he had obtained a sequestration.

2. That the defendant was not a "creditor having security for his debt" within sect. 184 of The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which disentitles such a creditor from receiving more than a rateable part of his debt.

3. And therefore that the defendant was entitled to the profits of the benefice as against the plaintiff.

THE plaintiff having brought error on the judgment in this case (reported below, vol. 4, p. 836), it was now heard before ERLE, C. J., POLLOCK, C. B., WILLIAMS and WILLES, JJ., and BRAMWELL, CHANNELL and PIGOTT, BB.

Mellish (*Wills* with him), for the plaintiff, repeated the arguments used by him in the Court below.

Lush (*Field* with him), contra, was not called on.

*754] *ERLE, C. J.—The judgment of the Court below must be affirmed. I do not think that sect. 135 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, applies here in the manner contended for by the plaintiff. The assignees of a beneficed clergyman who becomes bankrupt have an option, if they choose, to take the profits of a benefice by way of sequestration, but the benefice does not thereby pass to them; for that purpose they must resort to the mode pointed out by which they can acquire ecclesiastical property. The reasons which have prevailed with the Legislature, in enacting by stat. 1 & 2 Vict. c. 110,

s. 55, that the assignees of an insolvent shall not become entitled to the profits of a benefice except by sequestration apply here, and there is nothing to lead my mind to believe that the Legislature had a different intention in the two statutes.

Another question has been raised in this case, namely, whether sect. 184 of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, applies so as to enable the bankruptcy of one party to override the inchoate execution of a creditor proceeding towards sequestration, even if the sequestration of the assignee of the bankrupt had not been completely published. I think that section has no application to the profits of a benefice, for the reasons given by the Lord Chief Justice in the Court below, and also that the term "execution" does not apply to a creditor who issues a sequestration. The creditor who issues an ordinary writ of execution can only make it available against a bankrupt by seizure and sale before the bankruptcy. A creditor issuing a sequestration by which the profits of the benefice after the charges thereon are satisfied will be secured to him *when ascertained, is in a very different position from one who has proceeded by seizure and sale under a fieri facias. Here also, for the reasons assigned below, I think that the creditor's sequestration is not defeated by the bankruptcy. [*755]

The rest of the Court concurring,

Judgment affirmed.

MEMORANDA.

William Shee, Esq., one of the Justices of this Court, received the honour of Knighthood.

John Lee, Esq., LL.D., and *John Bridge Aspinall*, Esq., of the Middle Temple, were appointed of Her Majesty's Counsel.

END OF TRINITY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Michaelmas Term,

XXVIII. VICTORIA. 1864.

The Judges who usually sat in Banc in this Term were:—

COCKBURN, C. J.,
CROMPTON, J.,

MELLOR, J.,
SHEE, J.

TURNER and Another, Appellants, HER MAJESTY'S POST-MASTER-GENERAL, Respondent. Nov. 16.

Jurisdiction of justices.—Summary conviction.—Illegal custody.—Information and summons.—24 & 25 Vict. c. 97.—Waiver.

The appellants were apprehended and brought before a magistrate charged with setting fire to the letters in a pillar box. On their appearance at a Petty Sessions to answer the charge, after witnesses had been examined and cross-examined, they were, at the application of the prosecutor, remanded on bail for a week. At the adjourned Sessions the attorney for the prosecution stated that he should proceed against the appellants under stat. 24 & 25 Vict. c. 97, s. 52, and asked their attorneys whether they would plead guilty to such charge, or whether further evidence should be offered in support of it; they answered that he must go on and prove his case: other witnesses were then examined and cross-examined; and after the case for the prosecution was closed, the attorneys for the appellants objected that as no information on oath had been taken, as required by sect. 62, and the appellants were not found committing the offence, they were not legally in custody, and therefore the justices had no jurisdiction to convict them of the offence then charged. The offence with which the appellants were first charged was a felony punishable under sect. 10; the offence of which they were convicted was punishable on summary conviction. Held, that the want of an information and a summons was cured by the appearance of the appellants before the justices, and that they had waived the objection that they were not legally in custody on a charge under sect. 52, and therefore the justices had jurisdiction to convict under that section.

CASE stated by justices pursuant to stat. 20 & 21 Vict. c. 48, s. 2, and in obedience to a rule of this Court.

On the 9th January 1864, it was discovered that the letter-bag in the

pillar letter-box situate at Dresden, in the parish of Trentham, in the county of Stafford, together with several letters which had been posted and deposited therein, had been burned, and certain pieces of phosphorus matches were found therein, and thereupon information was given to the police authorities by the postmaster of Longton, in that county, and the appellants were apprehended and brought before a magistrate, charged with setting fire to the letters in the pillar-box at Dresden. The appellant Shepherd was remanded, and bail was taken for the appearance of the appellant Turner at the Petty Sessions to be held at Longton on the 13th January to answer for that offence. At those Sessions the appellant Shepherd was brought in custody, and the appellant Turner, being surrendered by his bail, appeared to answer the charge; an attorney appeared in support of it, and separate attorneys for each of the appellants, and witnesses having been examined and cross-examined by the respective attorneys, application was made on behalf of the prosecutor to remand the appellants for one week, that he might obtain the directions of the Postmaster-General as to the precise charge to be preferred against them upon the evidence adduced, and the appellants were *accordingly remanded on bail, to appear [*758 on the 20th January to further answer the charge. At the Petty Sessions, holden at Longton on that day, the appellants surrendered and appeared to further answer the charge, and the respective attorneys also appeared, and thereupon the attorney for the prosecution stated that he should proceed against the appellants, under the 52d section of stat. 24 & 25 Vict. c. 97, for having wilfully and maliciously committed damage, injury and spoil to and upon the letter-box, and upon the letters and property being therein; and the respective attorneys on behalf of the appellants were asked by the attorney for the prosecution whether they would plead guilty to such charge, or whether further evidence should be offered in support of it; and the respective attorneys for the appellants retired from the Court to consult together thereupon, and after a lengthened absence returned into Court and informed the attorney for the prosecution that he must go on and prove his case, but this was more in the nature of a private communication between the attorneys than a matter intended to be submitted to the justices; and other witnesses were then called and examined in support of the charge, and were cross-examined by the respective attorneys on behalf of the appellants; and after the examination and cross-examination of the witnesses were finished, and the case on behalf of the prosecution was closed, the respective attorneys on behalf of the appellants objected that inasmuch as no information on oath had been taken as required by the 62d section of stat. 24 & 25 Vict. c. 97, and the appellants were not found committing the offence, they were not legally in custody, and therefore the justices had no jurisdiction to convict the appellants of *the [*759 offence then charged against them; but it appearing to the justices that the appellants were lawfully apprehended and taken into custody by the police upon a charge made on oath with having committed an offence upon and with respect to the pillar letter-box and the letters and property therein, within the meaning of the 10th section of stat. 24 & 25 Vict. c. 97, the justices overruled the objection, and the respective attorneys without waiving their objection and without prejudice thereto, proceeded to address them on the merits of the case on behalf

of the appellants, and having called no witnesses in denial of or in answer to the charge, the justices convicted the appellants under the 52d section of that Act.

The question for the opinion of the Court was, Whether the appellants were legally and properly convicted of the offence.

The *Solicitor-General* (*Poulden* with him), for the respondent.—The arrest of the appellants without a warrant or summons was on the supposition that the offence was a felony punishable under sect. 10 of stat. 24 & 25 Vict. c. 97, but a pillar letter-box is not a building within the meaning of that section, which relates to placing gunpowder or other explosive substance “in, into, upon, under, against, or near any building.” Accordingly when the appellants appeared further to answer the charge, the attorney for the prosecution stated that he should proceed against them under sect. 52, which gives a justice power to convict summarily any person who “shall wilfully or maliciously commit any *760] *whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided.” The attorneys for the appellants thereupon desired him to go on and prove his case; and did not object to the jurisdiction of the justices to convict of the offence therein charged until after the case for the prosecution was over; and that was the conclusion of the whole case, because the appellants did not call witnesses. The objection therefore was taken too late. Further, when a defendant appears to a charge the want of a summons is immaterial: *Paley on Convictions*, p. 80, 4th ed. And although sect. 62 of stat. 24 & 25 Vict. c. 97, makes a charge on oath necessary before the issuing of a summons or warrant, it does not require an information in writing.

Harington, contra.—The appellants were not legally in custody in relation to the charge on which they were convicted; they were in custody charged with an indictable offence under sect. 10, and on such a charge the power of examining witnesses is only preliminary, and the Court is not necessarily an open one: stat. 11 & 12 Vict. c. 42, s. 19. [*COCKBURN*, C. J.—The Court became an open one from the moment the prosecuting attorney treated the charge as one for a misdemeanour. Suppose a person is before magistrates on a charge of felony, and the facts proved amount only to an offence for which he may be summarily convicted, must they let him go? His Lordship referred to *Wilkinson v. Dutton*, 3 B. & S. 821 (E. C. L. R. vol. 113).] If they did so, they still might immediately issue a warrant for his apprehension. The appellants did not plead to the charge upon which *they were con- *761] victed, according to the mode of proceeding prescribed in stat. 11 & 12 Vict. c. 43, s. 14. [*CROMPTON*, J.—That point was not raised before the justices; besides, when their attorneys in their hearing desired the attorney for the prosecutor to go on and prove his case, that was in effect a pleading to the new charge.] A man having been summoned for an offence under one statute cannot be convicted of another and different offence under another statute: *Martin v. Pridgeon*, 1 E. & E. 778 (E. C. L. R. vol. 102), *Reg. v. Brickhall*, 33 L. J. M. C. 156, 10 Jur. N. S. 677, before *Crompton* and *Mellor*, JJ., sitting in the Bail Court. And the law is the same, if a man be charged with an offence under one section and convicted of another offence under another sec-

tion of the same statute. [COCKBURN, C. J.—Suppose the appellants charged with two distinct offences, one against the Post-office and the other against the pillar-box, and the evidence before the magistrates were not sufficient to support one of the charges, would there be any objection to the jurisdiction of the justices to proceed upon the other?] Further, no information was laid charging the appellants with having committed the offence of which they were convicted. In Paley on Convictions, p. 54, 4th ed., it is said, “It is requisite in all summary proceedings of a penal nature that there should be an information or complaint, which is the basis of all the subsequent proceedings, and without which the justice is not authorized in intermeddling, except where he is empowered by statute to convict on view.” And the repetition of the evidence will not amount to an information: note (1) to Sanders’s Case, 1 Wms. Saund. 262. [CROMPTON, J.—This *objection also was [*762 not taken before the justices; but a minute of the complaint must have been made by their clerk, on which the conviction would be drawn up.] The condition of the recognisance for the appearance of the defendant where the case is adjourned, given in schedule (E.) to stat. 11 & 12 Vict. c. 43, is, that the defendant shall appear “to answer further to the information [or complaint.]” [MELLOR, J.—Suppose a recognisance to answer a charge of felony, and when the prisoner appears before the magistrates the prosecuting attorney abandons the charge of felony and makes a charge of misdemeanour, and the prisoner instead of asking for an adjournment is willing that the case should proceed on the new charge, and a conviction takes place on it? COCKBURN, C. J.—There must be an information to warrant a summons; but if a prisoner is in custody for a felony, and another prosecutor comes forward and says, “I have an information against him for a misdemeanour,” and the magistrate asks the prisoner whether he wishes that information to proceed or an adjournment, and he is willing that it should proceed, what objection could he afterwards take to the absence of an information preceding his attendance before the magistrate?] In the case of indictable offences, before a person is committed for trial the depositions must be taken in writing: stat. 11 & 12 Vict. c. 42, s. 17.

The *Solicitor-General* was not called upon to reply.

COCKBURN, C. J.—The case was heard upon the merits with the assent of the attorneys for the appellants. All that they could have asked for was that in point of strict form the evidence should be taken again on a fresh *charge, and that evidence in support of that charge only should be received. Practically that was done. The [*763 facts were the same, and the offence charged was under the same statute; the only question was whether the offence was a felony under sect. 10 of stat. 24 & 25 Vict. c. 97, as the police constable thought. It turns out that it amounts to an offence under sect. 52, which is punishable on summary conviction, and not a felony. In strictness the appellants were entitled to insist that there should be an information and summons in pursuance of sect. 62; but they waived that, and cross-examined the witnesses and exercised all their rights as defendants on the fresh charge: after that they cannot object that the justices had no jurisdiction to convict them summarily.

CROMPTON, J.—The objection before the justices was that the course prescribed by sect. 62, in the case of a person charged with an offence

punishable by summary conviction, had not been followed, and that as the appellants were not within sect. 61, which allows the arrest without warrant of persons found committing offences under the Act, they were illegally in custody, and the prosecution had no right to proceed against them for an offence under sect. 52. But here the appellants were before the justices upon a charge of felony, and when that charge was abandoned, they were told that the prosecution would go on, upon the charge of an offence punishable on summary conviction. I should have blamed the justices if, under those circumstances, they had refused an application by the appellants for an adjournment, but no such application was *764] made. There was then a charge before the justices, *and no doubt a proper minute of it was taken by their clerk. No point was made on behalf of the appellants that there was not a proper charge, and when they were asked whether they would plead guilty to it, their attorneys said that the prosecutor must go on and prove his case; at that time it was known what the charge was which the prosecutor was to go on and prove, they cross-examined the witnesses, and, after taking the chance of the evidence for the prosecution breaking down, they objected that the appellants were not legally in custody. But the want of a summons was cured by their appearance: the merits of the case were sufficiently gone into, and they cannot complain of the conviction on the ground that they were irregularly taken up.

MELLOR, J.—The appellants were irregularly in custody, having been arrested without a summons or warrant, and were bailed as for a felony. But on both occasions of their appearance before the justices the facts alleged against them were the same, and though they were brought up to discharge their bail, other circumstances show that they appeared voluntarily to answer the new charge: the magistrates were therefore justified in convicting on that charge which had been so made and heard.

SHEE, J., concurred.

Judgment for the respondent.

*765] *The MERCANTILE MARINE Insurance Company, Limited, v. TITHERINGTON. Nov. 18.

Marine Insurance.—Policy from, &c., and during thirty days' stay in port of discharge.

Policy of insurance on ship at and from "L. to any port or ports in the South and North Pacific Oceans in any order backwards and forwards, and during thirty days' stay in her last port of discharge:" these words were written: in other respects the policy was in the usual printed form. The ship arrived at her last port of discharge at 7 p. m. on the 25th May, and anchored there, and so remained until the 24th June, on which day, at 3.45 a. m., she was driven on shore in a gale of wind and lost. Held, that the thirty days were to be reckoned from the expiration of the twenty-four hours after the ship had arrived at her last port of discharge, and therefore the loss was covered by the policy.

THIS was an action for the recovery of money alleged to be due from the defendant by way of contribution towards the sum of 3000l., paid by the plaintiffs upon the total loss of a ship called The Albemarle. The following special case was stated without pleadings under The Common Law Procedure Act, 1852.

On the 26th November, 1862, Messrs. A. Baruchson & Co., the own-

ers of the ship *Albemarle*, effected a policy of insurance for 2000*l.* upon her. This policy was underwritten by the defendant for 100*l.* On the 26th December, 1862, they effected another policy on the ship for 1000*l.* On the 4th December they effected another policy on the ship for 2000*l.*

The ship sailed from Liverpool on the 23d December, 1862, and arrived at Mazatlan, being a port in the Pacific Ocean and her last port of discharge, on the 25th May, 1863, at 7 p. m., and then anchored there. The ship remained anchored at Mazatlan in safety until *the 24th June, 1863, and on that day, at 3.45 a. m., she was [*766 driven on shore in a gale of wind and wholly lost.

Messrs. Baruchson & Co. immediately on hearing of her arrival at Mazatlan proceeded to effect an insurance on the ship on her future voyage, and before any intimation of the loss they, on the 8th July, 1863, effected a policy with the plaintiffs for 3000*l.* They in like manner covered by insurance the sum of 2000*l.*, being the residue of the sum at which the ship was valued.

Upon hearing of the loss of the ship Messrs. A. Baruchson & Co. applied to the plaintiffs and the underwriters on the last-mentioned policy to pay them the amount of the loss, and the plaintiffs and the underwriters on the last-mentioned policy thereupon paid to the owners of the ship the several sums insured by them respectively.

In this action the plaintiffs sought to recover from the defendant 47*l.* 15*s.* 3*d.*, being the sum which they contended the defendant was liable to contribute in respect of the sum of 100*l.* for which the policy was underwritten by him.

The question for the opinion of the Court was, Whether the policy of insurance underwritten by the defendant was in force at the time of the loss of the vessel.

The several policies, which, excepting the insurance clause, were in the usual printed form, were annexed to the case: by that underwritten by the defendant Messrs. Baruchson & Co. caused themselves to be insured, lost or not lost, at and from "Liverpool to any port or ports in the South and North Pacific Oceans in any order backwards and forwards, and during thirty days' stay in her *last port of discharge, [*767 with leave to cruise off any port or ports in the Pacific for a period of thirty days:" the words between inverted commas were written.

Sir *G. Honyman*, for the plaintiffs.—The thirty days of the ship's stay in her last port of discharge did not expire until the 25th June, the first day being excluded and the last included, according to the rule applied to mercantile instruments, *Webb v. Fairmaner*, 3 M. & W. 473, *Young v. Higgon*, 6 Id. 49; and the usage being that a policy runs from midnight to midnight. The written words must mean that the ship should be insured for thirty days after the day of her arrival; for by the ordinary form of policy she would be insured during the whole of the 25th May until midnight. Even if the day of her arrival be included in the thirty days, the first day of her stay would not end till 7 p. m. on the 26th May, and the thirty days would not end till 7 p. m. on the 24th June, before which time the ship was lost.

Lush (*Cohen* with him), for the defendant.—The written words make this a time policy after the voyage was finished, and are not controlled by the printed words which occur in a subsequent part of the policy. In substitution of the twenty-four hours in the printed clause the parties

have agreed that the ship shall be insured for thirty days after her arrival; not for thirty days after the expiration of the twenty-four hours. The stay of the ship in the harbour began on her arrival there; and in calculating the thirty days' stay at Mazatlan the 25th May is to be *768] *included. If the thirty days were reckoned from midnight of the day of her arrival she would have been uninsured during the evening of that day. A time policy for one year executed on the 1st January would expire at midnight of the last of the three hundred and sixty-five days counting the 1st January as one. [COCKBURN, C. J.—I cannot think that the parties meant that both the periods of twenty-four hours and thirty days should run on together.] It is not unusual for a ship to be covered by two current policies. [CROMPTON, J.—But these periods occur in the same policy. Why should the period of twenty-fours be rejected?]

COCKBURN, C. J.—According to the practice of insurers and insured in voyage policies, the twenty-four hours after the arrival of the ship in her port of discharge are considered as forming part of the period of the voyage. The other period of thirty days mentioned in this policy is intended to start from the time when the voyage policy ceases.

CROMPTON, MELLOR and SHEE, JJ., concurred.

Judgment for the plaintiffs.

*769] *HEALEY v. The THAMES VALLEY Railway Company.
Nov. 3.

Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68.—Notice by party entitled to compensation.—“Nature of the interest.”

1. Under sect. 68 of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, a party entitled to compensation in respect of lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, if he desires to have the same settled by arbitration, must give notice in writing to the promoters of the undertaking, stating “the nature of the interest” in the lands; or, if he desires to have the question of compensation settled by a jury, he must give notice in writing to the promoters of the undertaking, stating “such particulars as aforesaid.” Held, that the notice must state the quantity as well as quality of the estate or interest.

2. A claimant, who was occupier under a lease for years, gave a notice which stated “the said lands and hereditaments are held by me on lease, and are used partly as and for private grounds and partly for farming and agricultural purposes.” Held, that it did not comply with sect. 68.

THE first count of the declaration stated that the defendants were a railway Company incorporated by The Thames Valley Railway Act, 1862, 25 & 26 Vict. c. cliii., and the plaintiff having an interest in certain pieces or parcels of land which had been taken by the defendants, as and being the promoters of the undertaking, to make the railway for the execution by them of the works of the railway, and in certain other pieces or parcels of land which had been injuriously affected by the execution of the works, and the defendants as such promoters had not made compensation to the plaintiff in respect of his interest in the land so taken and injuriously affected under the provisions of the Act or of any Act incorporated therewith; and the compensation claimed by the plaintiff in respect of his interest in the lands exceeded the sum of 50l.; and the plaintiff being so entitled and desiring to have the question of

compensation settled by a jury, gave notice in writing of such his desire to the defendants as such *promoters, stating in such notice the nature of his interest in the lands in respect of which he claimed [*770 compensation, and the amount of compensation so claimed by him being 1031*l.* 14*s.* 6*d.*; and the defendants as such promoters were not willing to pay the amount of compensation so claimed by the plaintiff, nor did they enter into a written agreement, &c., nor did they within twenty-one days after the receipt of the notice issue their warrant to the sheriff to summon a jury for settling the same in the manner provided by law; and by reason of such default to issue their warrant the defendants were liable to pay to the plaintiff, being so entitled, the amount of compensation so claimed by him. Averment. That before the suit all things had happened and been done and all times had elapsed to entitle the plaintiff to maintain the action and recover the amount claimed, with costs of suit. Breach. Nonpayment.

Second plea. That the plaintiff did not state in the notice the nature of his interest in the lands in respect of which he claimed compensation in accordance with the provisions of The Lands Clauses Consolidation Act, 1845.

On the trial, before Crompton, J., at the Middlesex Sittings in Easter Term, it appeared that the plaintiff was the lessee and occupier of a house and land at Hampton under a lease for the term of eleven years from Midsummer, 1853. The defendants, having power under their Act to take certain portions of the plaintiff's land for the formation of their railway, on the 21st May, 1863, served him with the usual notice under sect. 18 of The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. The twenty-one days within which, by sect. 21, claimants are required to state the particulars of their claims, or to treat with the promoters of the *undertaking, having expired without any claim, [*771 &c., being received, the defendants took possession under sect. 85. Negotiations as to the amount of compensation were entered into, but no agreement was come to; and on the 7th December the plaintiff served the defendants with a claim in respect of the lands and hereditaments, the particulars of which were contained in the schedule to the notice of the Company. In this claim he stated "the said lands and hereditaments are held by me on lease, and are used partly as and for private grounds and partly for farming and agricultural purposes;" and he claimed 1031*l.* 14*s.* 6*d.* as the value of his estate and interest in the lands and hereditaments, and as compensation for the damage that had been and would be sustained by him by reason of the lands and hereditaments being compulsorily taken by the defendants and by reason of the injuriously affecting the lands and hereditaments adjoining the lands required to be taken and then in his possession and occupation by the exercise of the powers of their Act. He also claimed to have such accommodation works made and executed as might be found necessary to be made and executed for the accommodation of the owners and occupiers of the lands adjoining the lands required to be taken, and gave notice that he was desirous that his claim should be settled by the verdict of a jury pursuant to The Lands Clauses Consolidation Act, 1845.

The defendants did not take any step on this notice.

A verdict was entered for the plaintiff for 1031*l.* 14*s.* 6*d.*, leave being reserved to move to enter a verdict for the defendants.

In the same Term,

*772] *Bovill* obtained a rule accordingly, on the ground *that the notice did not contain a sufficient statement of the nature of the plaintiff's interest within stat. 8 & 9 Vict. c. 18, s. 68.

The case was argued November 2d and 3d, and judgment given on the latter day.

Coleridge and *Patchett* showed cause.—By stat. 8 & 9 Vict. c. 18, s. 68, when a person claims compensation for lands taken by a railway Company he may have it settled either by arbitration or by the verdict of a jury; and if he desires to have it settled by arbitration he shall give notice thereof in writing to the Company stating “the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed;” or if he desires to have the question settled by a jury he shall give notice thereof in writing stating “such particulars as aforesaid.” The notice in the present case states “the nature of the interest” which the plaintiff has in the lands, for it states that they were held by him on lease and were used partly as private grounds and partly for farming and agricultural purposes. The Company having received this notice, may, under sect. 122, require the plaintiff to produce his lease; and, if not produced within twenty-one days after demand, he is to be entitled only to compensation as tenant from year to year. [CROMPTON, J.—But under sect. 68 the Company are bound to issue their warrant to the sheriff for summoning a jury within twenty-one days after the receipt of the notice from the party claiming.] By sect. 38 they must give ten days' notice to the other party of their intention to cause a jury to be summoned; so that they must *773] give that notice before they have *had inspection of the lease under sect. 122. [SHEE, J.—The notice under sect. 18 that the Company will require to purchase or take lands demands from the parties interested “the particulars of their estate and interest in such lands.” The phrase “such particulars as aforesaid,” in sect. 68, seems to refer to the particulars in sect. 18.] The word “aforesaid” must refer to the last antecedent in sect. 68, which is “the nature of the interest,” and that means the quality of the estate. The language in sect. 23 is the same. [SHEE, J.—That section provides for the amount of compensation being settled by arbitration, in which case the statement of the nature of the interest would be abundantly sufficient; but where the amount of compensation is to be awarded by a jury the Company must, under sect. 38, give ten days' notice of their intention to cause a jury to be summoned, and in such notice state what sum of money they are willing to give for the claimant's interest in the lands, and unless they have notice of that interest how can they make an offer? MELLOR, J.—I doubt whether sect. 38 is not confined to the ordinary cases in which compensation is to be assessed before the lands are taken: if so, it does not apply to proceedings under sect. 68.] Sect. 18 requires that the notice from the Company shall demand from the parties interested “the particulars of their estate and interest,” and shall state “the particulars of the lands so required;” but sect. 68 only requires that the notice shall state “the nature of the interest.” A notice which states the legal nature of the interest is sufficient. It could not be contended that the notice should state particulars respecting each parcel of land. [MELLOR, J.—Suppose there were three fields, of one of which the party was ten-

ant in fee, of the *second tenant for his own life, and of the third tenant for the life of another, would a statement that he had a [*774 freehold interest be sufficient? And with respect to leasehold interests, not only lessees for terms of years, but tenants for a year and from year to year, are entitled to compensation: sect. 121.]

In *Cameron v. The Charing Cross Railway Company*, 16 C. B. N. S. 430 (E. C. L. R. vol. 111), it was held that a notice under sect. 68, which stated that the claimant was "the occupier of a dwelling-house, bakehouse, and shop, situate, &c., and which said premises are used by me for carrying on therein my business as a baker," was sufficient; and Erle, C. J., said, p. 446, "It is impossible that these notices can be so framed as to enable the Company to obtain an accurate or even an approximate estimate from a surveyor. If the party had stated—as the fact was in one of these cases,—that his lease for twenty-one years had yet twelve years to run, unless he went on to say what was the rent, and what the covenants which the lease contained, no surveyor could form an opinion as to the fairness of the claim. And it is quite clear that the claimant is not bound to give in his notice all the details which a surveyor would require." And Willes, J., p. 448, "The next question is whether the notice given was sufficient,—whether the claimant has complied with the condition which the statute has imposed upon persons making claims against railway Companies. If he has, I apprehend it is not for the Court to say that he has not done it sufficiently or in the most convenient possible manner." And Byles, J., p. 450, contrasts the language of sect. 18, which applies to lands to be taken by the Company, with the language of sect. 68 which applies *to lands [*775 which have been taken or injuriously affected. In *Re The North Staffordshire Railway Company and Landor*, 2 Exch. 235, an award made by an umpire under sects. 23, 27, founded on a notice given by the Company under sect. 18 was held bad because the umpire had not found the nature of the interest of the claimants in the lands, and awarded a distinct compensation in respect of it; and Parke, B., said, p. 242, "The award ought to find the particular interest of the parties, whether an estate in fee or for life, or what other interest;" but it would be information of no value to state that it was an estate for life, unless the age of the claimant was specified, or that it was an estate in reversion unless the length of the unexpired lease was mentioned. Suppose the interest of the claimant was a contingent remainder. [COCKBURN, C. J.—The party must give such a notice as under the circumstances may be reasonably expected from him with reference to the object of the statute. If the interest is complicated a general statement might be sufficient; but if the interest were the residue of a term, which is the case provided for in sect. 119, a statement that the party held under a lease would not be sufficient.]

Bovill, Horace Lloyd and Shield, in support of the rule.—In *Cameron v. The Charing Cross Railway Company*, 16 C. B. N. S. 430 (E. C. L. R. vol. 111), the notice was held sufficient it being immaterial whether the claimant was entitled in fee simple or for any less estate or interest, because the Company did not take the premises, and compensation was sought for a temporary obstruction, not a permanent injury. But Erle, C. J., said, p. 446, "I am inclined to *go very much [*776 with Mr. *Lush* in his suggestion that it is the duty of the party

claiming compensation to give the Company such information as will enable them to form a judgment as to the fairness and propriety of the claim that is made upon it." The other Judges expressed doubts on the point, and a distinction was taken by Willes, J., p. 448, and Keating, J., p. 451, between a notice to be given by a claimant in respect of his being owner and one in respect of his being occupier. [COCKBURN, C. J.—Suppose a claimant gives a notice which turns out to be inaccurate by inadvertence, as if it states that he holds under a lease of which thirty years are unexpired, and he afterwards discovers that his interest will continue for fifty years.] On the inquiry the jury have no power to inquire into title, and must proceed upon the footing that the interest is as stated in the notice; because by sect. 51 the costs of the inquiry are to be borne by the Company where the verdict is given for a greater sum than that offered by them. [MELLOR, J.—Re Hayward and the Metropolitan Railway Company, 4 B. & S. 787 (E. C. L. R. vol. 116), seems to show that the claimant may amend his claim before he has notice of the time and place of holding the inquiry. COCKBURN, C. J.—Suppose the claimant overstates his claim.] It is only on an action being brought for the amount assessed by the jury that the Company can contest the claimant's title. In *Smith v. The London and North Western Railway Company* (a) the plaintiff had claimed in respect of a right of way more than he was entitled to, and the arbitrator having assessed the amount of compensation in two ways his award was *777] quashed. A jury afterwards assessed the amount on the claim; and in an action on the judgment, to which the Company pleaded that there was no right of way, they obtained a verdict. Further, the object of a statement of the nature of the interest is to enable the Company to make such an offer of compensation as may be accepted by the claimant, or if refused may protect them against the penalty of costs under sect. 51: for that purpose they must know the quantity of the claimant's interest or estate. The statement that the house and land were held on lease apply equally to a lease which expires to-morrow and a lease for 999 years. The Court will not put a different construction on sects. 18 and 68. [They referred to *Reg. v. The Manchester, Sheffield and Lincolnshire Railway Company*, 4 E. & B. 88 (E. C. L. R. vol. 82).]

COCKBURN, C. J.—I am of opinion that this rule should be made absolute. I have had some difficulty in arriving at this conclusion, because the language of the Legislature in stat. 8 & 9 Vict. c. 18, s. 68, "the nature of the interest in such lands," *prima facie* implies that the notice to be given by the claimant should state the *quality* of the interest or estate, whether freehold, leasehold, or otherwise, which he has in the lands, rather than the quantity of it; and therefore, where the interest is leasehold, a statement of the number of years for which the claimant's lease is to run would not be required. Still the words are general and vague, and may have been used by the Legislature as comprehending a statement of the *quantity* as well as the *quality* of the interest or estate; *778] and interpreting them by the light to be obtained from other parts of the statute, and from general considerations bearing on this subject, if we see that the narrower construction of these words

(a) Not reported; but referred to in *Horrocks v. The Metropolitan Railway Company*, 4 E. & B. 315, 320 (E. C. L. R. vol. 116).

would defeat the purpose of the Legislature, we ought to adopt the larger construction, so as to give effect to what may reasonably be presumed to have been its intention. The scheme with reference to the taking of lands by railway Companies against the will, or, at all events, without the consent of the owner, is this. The Company are in the first place to give the party interested the notice, required by sect. 18, of their intention to take the lands required, and likewise of their willingness to treat with him for the purchase thereof, and, in order to enable them to treat with him on fair ground, they are to demand from him the particulars of his "estate and interest in such lands." If the owner intends to negotiate with them, and so avoid the necessity of litigation, he must furnish those particulars, and there can be no doubt that in that section the term "particulars" means such as would enable the Company to ascertain the true value of the lands, and so offer the party interested compensation accordingly. If he declines to treat, or if negotiations having been entered into do not issue in a satisfactory result, the Company are not defeated in their right to get the lands, for they are to take possession of them. In that case the position of the parties is reversed; the owner of the lands must make his claim for compensation, and the 68th section requires that in that claim he should state "the nature of the interest in such lands;" and the question is whether the statement may be less full than that which he would have been bound to make if it had been a statement of particulars under sect. 18. There can be no reason why he *should afford less com- [*779 plete information where he claims compensation from the Company adversely, they having taken possession of his lands, than where he makes the claim with a view to negotiation which may end in an agreement as to the amount. On the contrary, as soon as the parties assume a hostile attitude, there is the greater reason why the owner of the land should give full information, inasmuch as, if they cannot agree, and the matter goes before a jury, the Company will have to pay the penalty of costs under sect. 51 if they have not made such an offer as the jury shall deem reasonable. And it is plain that, unless the Company have such information, they cannot be in a situation either to satisfy the claim of the owner of the lands without having recourse to litigation, or to make such an offer of compensation as will bear them harmless with regard to costs. On these grounds, therefore, I think that the true construction of sect. 68 is, that the term "nature of the interest" in that section is equivalent to the term "particulars of estate and interest," which is used in sect. 18. In the present case, all that the claimant has stated is, that his interest is leasehold. That affords no guide for the Company either as to paying him at once the full amount of compensation claimed, or making him an offer which would put them in a right position as to costs. I think therefore he has not done sufficient, and that the Company are entitled to say that this notice is not such that they are liable to pay the amount of compensation claimed.

As to the case of *Cameron v. The Charing Cross Railway Company*, 16 C. B. N. S. 430 (E. C. L. R. vol. 111), I fully concur in that decision, upon the ground that the obstruction in that case being *temporary, it was unnecessary in order to guide the Company [*780 that the claimant should state more than that he had the interest

of an occupier; but the language of the Judges there does not apply to the present case.

CROMPTON, J.—The question is whether a valid notice was given by the plaintiff to the Company. Sect. 68 puts the Company in a bad position; it subjects them to pay the whole amount claimed if they do not perform a certain act which they are ordered by the Legislature to perform on receiving a valid notice. We ought to see clearly that a notice given under such a provision is valid. I think the notice in the present case is not. Looking to the words in the last clause of sect. 68, “stating such particulars as aforesaid,” coupling them with the words “the nature of the interest in such lands in respect of which he claims compensation” in the preceding part of the section, and then looking back to sects. 18, 21 and 23, which deal with a similar matter, and in which occur the expressions “the particulars of their estate and interest,” “the particulars of his claim,” and “the nature of the interest,” I am inclined to think it would not be a strained construction to say that the Legislature meant the same thing by these expressions in sect. 68. In modern Acts of Parliament we have frequently to complain of variations being made in the language for no apparent reason except that it is supposed to be more elegant and look better in print. The object of the notice is that the Company may act upon it, by resolving whether they will pay the amount claimed or not. But this notice only says that the interest of the claimant is leasehold. It does not say whether it was the *781] residue of a term, as it happened to *be in the present case, or a tenancy from year to year, or a freehold lease for life or lives, or a long valuable lease. It does not give any information upon which the Company could act.

I agree with the Judges in the Court of Common Pleas, that the notice is not to supersede all inquiry. The most minute particulars a notice could state would still leave it necessary for the Company to inquire as to the value of the land and other matters; but the claimant is to give them sufficient information to put them upon inquiries which would enable them to judge whether the claim is too large, and how they should act upon the notice. In treating this as a question whether the notice is sufficient, with reference to the nature and circumstances of the claim, we act upon the principle of the decision in *Cameron v. The Charing Cross Railway Company*, 16 C. B. N. S. 430 (E. C. L. R. vol. 111). In that case the question was whether the notice was sufficient with reference to a claim of compensation for injury to an occupier by a temporary obstruction; here the question is whether the notice is sufficient with reference to a claim of compensation for taking land. My brother Keating expressly says, p. 451, “The distinction, I think, was well pointed out by Mr. *MacLachlan*, in his able argument, between the notice required where the Company give notice of their intention to take land, and the notice in a case like this, where the claim is in respect of an injury which could only affect the occupying tenant.” Whether claimants give a sufficient notice is a question of law for us, like the question whether notice of dishonour of a bill of exchange is sufficient. In my *782] opinion this notice *is not sufficient under the circumstances, and therefore the rule must be made absolute.

MELLOR, J.—I entirely agree in the view which the Lord Chief Justice has taken of the machinery of stat. 8 & 9 Vict. c. 18, and of the

effect of its provisions. Looking at sect. 68, I think the words "nature of the interest in such lands" may be read as including not only quality but quantity, when we find them in immediate connection with the words "in respect of which he claims compensation, and the amount of the compensation so claimed therein." Then observe what follows in case the party desires to have the question of compensation settled by a jury:—"And unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury, &c., and in default thereof they shall be liable to pay the party so entitled as aforesaid the amount of compensation so claimed." The Legislature must have intended that the Company should have such information of the interest for which they were required to pay or tender compensation as would enable them to form a judgment as to the amount.

I agree with my brother Crompton that it is a question in each particular case whether the notice is sufficient. I also agree with the observations of the Judges in *Cameron v. The Charing Cross Railway Company*, 16 C. B. N. S. 430 (E. C. L. R. vol. 111); for they were looking only to the nature of the interest *which in that case was alleged to have been injuriously affected. The interest was that [*783 of an occupier, and the injury had ended before the occupation ceased. Therefore all the information which could be required by the Company in that case was afforded by the notice. I also agree that it is not intended that the notice should supersede all inquiry on the part of the Company as to matters which are patent. The notice should give that information which is peculiarly within the knowledge of the claimant, and is requisite to enable the Company to form a judgment as to the propriety of the claim made upon them, before they issue their warrant.

SHEE, J.—In considering the 68th section of stat. 8 & 9 Vict. c. 18, we must look at the words of other sections, the 18th, 21st and 23d, which are necessarily connected with it, also the 38th and 51st, and we must construe the last clause of sect. 68 with reference to its manifest object and to the effect which the construction we give it would have upon that of the 38th and 51st sections. [His Lordship read sect. 68.] When we look back to sect. 38 we find that, in the requirement of sect. 68, that the Company shall issue their warrant within twenty-one days after the receipt of notice from the party of his "desire to have such question of compensation settled by a jury," is involved the further requirement that they shall give not less than ten days' notice of their intention to cause such jury to be summoned, and in such notice they shall state what sum of money they are willing to give: so that, incorporating the 38th with the 68th, it is incumbent on the Company, within twenty-one days, not only to issue their warrant to the sheriff to summon a jury, but also to state the *amount they are willing to pay; [*784 and by sect. 51, if they offer a sum less than that given by the jury, they will have to pay all the costs of the inquiry. Putting these three sections together, it seems to me that the Legislature could not have intended that it should be sufficient to give the Company a general notice, which would not enable them to determine whether the compensation claimed was reasonable or not. In the present case merely stating

that the interest was leasehold would not enable them to form any estimate of its value.

I thought, in the course of the argument, that the words "nature of the interest" in sect. 68 referred only to the case of arbitration provided for in sect. 23 and in the last clause but one of sect. 68; but the Lord Chief Justice and my learned brothers did not agree with me, and I do not found my judgment upon that. The word "particulars" in the last clause of sect. 68 may well refer both to the words "nature of the interest" in the preceding clause and to the words at the commencement of the section, "entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works." Therefore, I concur in the judgment of the rest of the Court. Rule absolute.

***785] *The QUEEN v. HALL DARE. Nov. 9.**

6 & 7 W. 4, c. 96, s. 1.—Poor-rate.—Deductions.—Tenant's Taxes.—General and local sewers tax.—Expenses of flood-gate and sea-wall.

In assessing land to the poor-rate the owner and occupier is entitled, under stat. 6 & 7 W. 4, c. 96, s. 1, to have deductions made from the gross rateable value of his property (1) in respect of the general sewers tax imposed by the Court of the Commission of Sewers, under stat. 4 & 5 Vict. c. 45; (2) in respect of the amount at which he is rated by the Court of the Commission of Sewers for the maintenance and cleansing of the sewers and works in a Level by which the rated lands are benefited; (3) in respect of the average sum annually expended by him in the maintenance and repairs of a sluice or floodgate and gote, under the jurisdiction of the Commissioners, and on his lands, by which his lands alone are benefited, and which works are necessary to maintain the lands in a state to command their rent; (4) in respect of the sum annually expended by him in the maintenance and repairs of a sea-wall which the owners of lands fronting a navigable river were bound to keep up under a presentment made at a Court of Sewers, and the maintenance of which wall was necessary to protect his lands: as all the above are tenant's and not landlord's taxes: Cockburn, C. J., dubitante about the third head and Mellor, J., about the two last.

On appeal to the Epiphany Quarter Sessions for the county of Essex, in 1864, against a rate for the relief of the poor of the parish of Wennington, the Sessions confirmed the rate subject to the following case.

The appellant is the owner and occupier of a mansion-house and about 480 acres of land in the parish of Wennington, and of this quantity 400 acres or thereabouts are situate within the limits of the level of Wennington. The parish of Wennington comprises in its whole extent about 1270 acres of land, of which quantity not quite 860 acres are situate within the limits of the Level.

A commission of sewers is legally existing under and by virtue of stat. 23 H. 8, c. 5, and the several other statutes relating to sewers, in the county of Essex, called the Rainham Commission, within the jurisdiction of which (among others) is the Level of Wennington.

***786]** The 400 acres of land situate in the parish and within *the Level of Wennington, of which the appellant is owner and occupier, are duly taxed by the Court of the Commission of Sewers at an annual sum amounting in the average to 50*l.* for the general sewers tax under the powers and authority of stat. 4 & 5 Vict. c. 45, and the appellant duly pays such tax.

The appellant is also duly taxed and assessed by the Court of the

Commission of Sewers, under the authority of the statutes in that behalf, in a sum amounting in the average to 15*l.* yearly for the due maintenance and cleansing of the sewers and works in the Level of Wennington from which his lands in the level receive benefit and avoid damage: this rate also the appellant has always paid.

There are under the jurisdiction of the Commissioners within the level, and on the lands of the appellant there, a sluice or floodgate and gote, by which the lands only of the appellant are benefited, and which works are necessary to maintain the lands in a state to command their rent. The sluice or floodgate and gote are repaired and cleansed under the superintendence of the marsh bailiff at an annual average expense of 10*l.*, which is borne by the appellant.

The lands situate within the level of Wennington abut on the river Thames, and are protected from being inundated and covered by the waters thereof by a sea wall fronting the river, the whole length of which wall is 1 mile 6 furlongs and 23 poles.

At a Court of sewers duly held under the commission, on the 16th April, 1861, the jurors then duly impannelled on their oath presented (as the facts are), That the several persons named and mentioned in the second Schedule thereunder written or thereto annexed, which was to be deemed and taken as part of that presentment, *and their [*787 ancestors and predecessors, as being owners of the respective quantities of land within the level and the jurisdiction aforesaid set opposite to such their respective names and descriptions in the Schedule, had from time immemorial been used and accustomed to repair and of right ought to have repaired, and the said several persons still of right ought to repair, at their own respective costs and charges, when and as often as requisite in respect of their lands and their respective estates therein, and by reason of their being such owners thereof, the several and respective quantities of walling within the level and at the respective parts or places mentioned or specified and set forth in the last-mentioned Schedule. And that the several persons so named and mentioned in the last-mentioned Schedule were then the owners of the particular lands therein also mentioned opposite to their respective names and descriptions, and as such owners and in respect of such lands and their estates therein respectively ought by reason of the immemorial custom and usage aforesaid to support, maintain, and repair the walling at their own respective costs and charges in the proportions mentioned and set forth in the same Schedule opposite such names and descriptions respectively, and at the respective parts or places therein also in that behalf mentioned and described.

In the second Schedule annexed to the presentment the appellant is mentioned to be liable to repair 4 furlongs 38 poles of the walling as owner of 88 a. 3 r. 30 p. of land situate within the level, and also another length of 1 furlong 15 poles of the walling as owner of 67 a. and 9 p. also situate within the level. The 88 a. 3 r. 30 p. and 67 a. and 9 p. respectively form part of the *400 acres within the level of which the appellant is such owner and occupier as aforesaid, and [*788 the appellant in fact maintains and repairs the 4 furlongs 38 poles and 1 furlong 15 poles of walling, and the expense of the maintenance and repair thereof amounts on an average to 40*l.* yearly. The owners of the other lands mentioned in the Schedule (comprising altogether about

400 acres only out of the entire lands situate within the level) repair the remainder of the sea-wall according to their respective liabilities.

The appellant was rated in the poor-rate appealed against, and which was made in accordance with the valuation list approved by the committee acting under The Union Assessment Committee Act, 1862, 25 & 26 Vict. c. 103. [The rate was set out.]

In assessing and rating the appellant to the rate no deduction or allowance whatever was made for or in respect either of the general sewers tax or the rate for the maintaining and cleansing of the sewers, nor for or in respect of the respective amounts expended by the appellant for repairing and cleansing the sluice or floodgate and gote, or for the maintenance and repairing of the sea-wall, and it was admitted that if such deductions had been made the assessment in other respects would be proper and just. The appellant contended before the assessment committee that he was entitled to a deduction in respect of all those sums, but they refused to make any allowance in respect of any of them.

The appeal to the Sessions was then brought, and the questions raised thereby were, whether the appellant was entitled to have a deduction made from the gross rateable value of his property in respect of any or either and which of the said several sums.

*789] *The questions for the opinion of the Court were:—

First. Whether in the rate the appellant was entitled to a deduction from the gross estimated rental of his property in respect of the general sewers tax.

Secondly. Whether in the rate the appellant was entitled to a similar deduction in respect of the amount at which he was rated for the maintenance and cleansing of the sewers and works in the level.

Thirdly. Whether in the rate the appellant was entitled to a similar deduction in respect of the sum annually expended by him in the maintenance and repairs of the sluice or floodgate and gote upon his lands.

Fourthly. Whether in the rate the appellant was entitled to a similar deduction in respect of the sum annually expended by him in the maintenance and repairs of the sea-wall.

Lush, Murphy and Horace Davey, for the respondents.—First. The general sewers rate is a landlord's tax, and if paid by the tenant may be deducted from the rent; and therefore is not to be deducted in estimating the net annual value of property under the Parochial Assessments Act, 6 & 7 W. 4, c. 96, s. 1: *Palmer v. Earith*, 14 M. & W. 428; *Baker v. Greenhill*, 3 Q. B. 148 (E. C. L. R. vol. 43). Stat. 23 H. 8, c. 5, s. 8, gives the Commissioners power to seize and sell the land in the event of nonpayment of this tax, which shows that it is a landlord's tax.

Secondly. So also is the annual tax for maintaining and cleansing the sewers and works in the Level.

Thirdly. The expenses of maintaining and repairing the sluice or floodgate and gote, by which the lands of the appellant only are benefited, are not within the terms of *stat. 6 & 7 W. 4, c. 96, s. 1, *790] "other expenses, if any, necessary to maintain them" [the hereditaments] "in a state to command such rent."

Fourthly. The sea-wall is no part of the appellant's premises, and therefore the expense of maintaining and repairing it is not to be deducted in estimating the net annual value. In *Reg. v. The Inhabitants of Vange*, 3 Q. B. 242 (E. C. L. R. vol. 43), it was held that the appel-

lant was not entitled to a deduction in respect of such a sea-wall. The only difference between that case and the present is that the annual cost of maintaining the sea-wall there was equal to the gross annual value of the land. [COCKBURN, C. J.—The cost of a sea-wall diminishes the actual value of the land.] Under stat. 6 & 7 W. 4, c. 96, s. 1, the net annual value of the property in the supposed tenant's hands is to be ascertained.

Mellish and Philbrick, for the appellant.—First. The general sewers tax is a tenant's tax: it is imposed under stat. 4 & 5 Vict. c. 45, s. 1. The annual expense of keeping up the commission of sewers is a charge on the occupier, not on the owner. By sect. 2 of the Act the Court of Sewers are empowered to direct the apportionment of the general tax "among the occupiers of the lands and hereditaments" in each parish, township or place, within the jurisdiction of the Court of Sewers, "in such proportions and upon such individuals as of right ought to pay the same." And, by sect. 3, the remedy for recovery of the apportioned rate is by distress on the person rated, and there is no provision enabling him to deduct it from the rent paid to his landlord. The Commission recited in the first statute of sewers, *23 H. 8, c. 5, s. 3, empowers the Commissioners to assess the person "who hath or [*791 holdeth any lands or tenements, &c.," which applies to the occupier as much as to the owner of the fee. [SHEK, J.—In Com. Dig. *Sewers* (A.) it is said, "By the common law the King might make a commission for the survey and repair of the banks, walls, and other fences against the sea, before any statute of sewers;" and the principle is that those only are liable to be assessed who derive or are likely to derive benefit from the repair. In the same book (E. 2), "It is sufficient to charge the visible owner or occupier; for if he is not liable for the whole, he may be remedied by application to the Commissioners." And in (E. 5), "So, to extraordinary repairs, which tend to the benefit of the inheritance, a lessor, or reversioner, or remainderman, after an estate for life, or years, may be assessed." COCKBURN, C. J.—The words of the Commission, as recited in stat. 23 H. 8, c. 5, s. 3, are, "all those persons, and every of them, to tax, assess, charge, distrain, and punish, &c., after the quantity of their lands, tenements, and rents, by the number of acres and perches, after the rate of every person's portion, tenure, or profit, or after the quantity of their common of pasture, or profit of fishing, or other commodities there:" those words point to owners of inheritance and not to estates for years.] If the expense is merely to keep up the annual value the occupier is rateable. [COCKBURN, C. J.—Not quæ occupier, but as owner of a tenement.] Both the owner and the occupier may be assessed.

Palmer v. Earith, 14 M. & W. 428, only decided that under an agreement that the tenant should pay parochial and parliamentary taxes, he was not liable to pay a sewers rate: it was assumed that independently of agreement the *sewers rate would be paid by the tenant. In [*792 *Rex v. Adames*, 4 B. & Ad. 61 (E. C. L. R. vol. 24), decided before stat. 6 & 7 W. 4, c. 96, it was held that land which was liable to a sewers rate was not rateable at the same sum as land not so liable, but should be rated at that sum minus the sewers rate: though Lord Tenterden, who died before judgment was delivered, was of a different opinion (see p. 69). By stat. 6 & 7 W. 4, c. 96, s. 1, the rate is to be

made upon an estimate of the net annual value of the several hereditaments rated thereunto; and the net annual value is explained by the subsequent words which are "free of" not "deducting" "all usual tenant's rates and taxes." [COCKBURN, C. J.—Confusion is introduced by those words; of course the tenant in offering a rent takes into account the expenses with which his profits will be encumbered. If we treat all about tenant's rates and taxes as surplusage we get an intelligible rule.]

Secondly. The annual cost of maintaining and cleansing the sewers and works from which the appellant's lands in the level receive benefit and avoid damage is also a tenant's tax.

Thirdly. The expense of maintaining and repairing the sluice or floodgate and gote upon the appellant's land is not distinguishable from the expense of repairing a house or barn.

Fourthly. The sea-wall benefits other land, but each landowner who fronts the shore pays for the maintenance of it in proportion to the length of his land abutting on the sea. *Reg. v. The Inhabitants of Vange*, 3 Q. B. 242 (E. C. L. R. vol. 43), has no bearing on this case. There an island required a sea-wall all round it, and on a grant of one-third of the lands in the island to the appellant he undertook to maintain the sea-wall; and the question was whether *he was rateable *793] to the poor at all, the assessment on the lands granted being equal to the full annual rent; but it was held that he was rateable for the full annual value of his lands, as the repair of the sea-wall was a burden on his property like a mortgage or rent-charge. [CROMPTON, J.—The burden of keeping up the sea-wall was part of the price he paid for the land.]

None of these taxes are imposed for extraordinary repairs, and therefore deductions ought to be allowed in respect of all of them as expenses necessary in order to maintain the property in a state to command the rent.

COCKBURN, C. J.—I am of opinion that our judgment ought to be for the appellant.

As to the first and second heads, the question is whether, in assessing to the poor-rate the property of the appellant, who is owner and occupier, for the purpose of ascertaining the rateable value, a deduction should be made in respect of the general and local sewers rates and taxes to which the property is subject. The Parochial Assessments Act, 6 & 7 W. 4, c. 96, s. 1, provides that an estimate shall be made of the net annual value, and that such value shall be ascertained by the rent at which the land would let from year to year after deducting all usual tenant's rates and taxes. It is said on behalf of the appellant, first, that these sewers rates imposed under the authority of stat. 4 & 5 Vict. c. 45, are tenant's taxes, and therefore to be deducted; and secondly, supposing they are not tenant's taxes, still they are to be deducted, for stat. 6 & 7 W. 4, c. 96, s. 1, goes on to provide that the rent which the supposed tenant pays shall be subject to further deduction in respect of the probable average annual cost of repairs, insurance, *794] and other expenses, *necessary to maintain the property in a state to command the rent. Whether expenses not incurred by the proprietor himself, but cast upon him by the maintenance of the district sewerage to which he is by Act of Parliament compelled to contribute, are expenses within this provision, is a difficult question. It

is, however, not necessary to decide it, because I think we are warranted in holding that the rates and taxes in question are tenant's taxes. By The Sewers Act, 23 H. 8, c. 5, s. 3, it is provided that the Commissioners of Sewers for the purpose of maintaining sea-walls, sewers, &c., shall tax, assess and charge the persons holding lands or tenements within the limits of the commission "after the quantity of their lands, tenements, and rents, by the number of acres and perches, after the rate of every person's portion, tenure, or profit." Whenever, therefore, the Commissioners find a person in possession of a tenement within their district, they are entitled to tax him according to the nature of his interest and the profit he derives from his land. What would be the position of the imaginary tenant from year to year, referred to in stat. 6 & 7 W. 4, c. 96, in occupation of land within this district? He is liable to be taxed according to the quantity of his interest, and therefore he is liable to an annual assessment in proportion to his estate. There is nothing in the Act either expressly declaring or leading to the inference that a tenant from year to year is not included, or that the reversioner is liable to reimburse him. The inference is rather the other way, for he would not be taxed according to the quantity of his interest if he were able to come on his landlord for the payments he had made. Suppose a general sewers tax imposed for all time to come, the Commissioners must *distinguish between the occupier and the reversioner, and assess them according to the quantity of [*795 their interest. If so, this is a tax to which the tenant is liable to be assessed and which he is bound to pay, and which he is not able to call upon his landlord to reimburse him. It is properly and essentially a tenant's tax, which is a tax which the tenant in occupation is not only primarily but ultimately called on to pay, and, being so, is to be deducted from the rent in calculating the rateable value.

The third and fourth heads have no reference to yearly value, but relate to permanent works; and the question is whether they are within the description of expenses necessary to maintain the property in a state to command the rent. Although I have difficulty as to the sum expended for the maintenance and cleansing of the sluice or floodgate and gote, I have not the same difficulty as to that expended for the maintenance and repair of the sea-wall. However, they are not expenses incurred by the proprietor himself, but in the course of carrying out a general scheme, and, the deductions claimed being only in respect of the average annual cost, I think they also ought to be allowed.

CROMPTON, J., had left the Court.

MELLOR, J.—I have some doubt, but on the whole my opinion agrees with that of the Lord Chief Justice as to the two first heads, for the reasons which he has given. They are deductions which the tenant would make in fixing the rent which he would give.

With reference to the other two heads, I am not so satisfied that the reason given applies; but, if not, still *they are repairs necessary to enable the property to command the rent, and there- [*796 fore, in order to ascertain the rateable value, should be deducted.

SHEE, J.—The appellant, the owner and occupier of lands and tenements, is rated on an assessment to the poor-rate, in which no account has been taken of the charge to which 400 acres of his property are subject for sewers rates. The amount of the sewers rates is not ascer-

tained by a fresh valuation from year to year, but is thrown over many years, and in each year the rate is assessed on the occupier of land and is payable by him. The question whether this charge has been rightly omitted in rating the appellant depends on the construction of stat. 6 & 7 W. 4, c. 96, s. 1. I think the rent referred to in that enactment is that which a tenant from year to year would give subject, among others, to this charge; for I understand the words "free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any," as meaning "without regard to" or "putting aside" all rates and taxes which fall upon the tenant, and the tithe commutation rent-charge; and then are to be deducted the average annual cost of repairs and insurance, which the landlord must pay unless there be an agreement with the tenant otherwise, as well as all other expenses necessarily incurred by the landlord in order to enable the property to command the assumed rent. Therefore the sewers rates must be taken into account in ascertaining the net annual value; and the appellant is overrated.

That reasoning would include also the third and fourth heads.

Judgment for the appellant.

***797] *GLEDSTANES and Others v. The Corporation of the ROYAL EXCHANGE Assurance. Nov. 11.**

Marine Insurance.—Open policy.—Declaration of ship.—Knowledge of loss.—Knowledge of excess of insurance on cargo of particular ship.

The plaintiffs were agents in London of an insurance Company at Hong Kong, which had also an agent at Calcutta. Merchants at Calcutta desirous of effecting insurances with the Company make application to their agent before the goods are shipped, or the name of the intended ship known, or the quantity or particulars of the merchandise defined, and if the application is accepted a slip naming the risk accepted is delivered to the assured, and as soon as the particular ship is determined on a policy expressed to be upon the whole amount of merchandise consigned by that ship is drawn up and delivered to the assured: what quantity of merchandise is covered by the policy remains uncertain until actually shipped.

The Company, not deeming it expedient to take upon themselves risks to a greater extent than 5000*l.* upon any one ship, the plaintiffs as their agents in London effected on their behalf, with the defendants and others, open policies of insurance to cover the excess of 5000*l.* upon any one ship. In accordance with this course of business the plaintiffs effected a policy of insurance with the defendants, dated the 8th October, 1858, for 7000*l.* "Being on goods . . . part of 10,000*l.* to cover the excess of 5000*l.* which may be taken by the Calcutta agent of The Hong Kong Insurance Company on any one ship." The ships were described as "first-class ship or ships as may be declared." From time to time, as the plaintiffs received advices stating the names of the ships and the particulars of the amounts of excess on each, they made declarations of the amounts and names of the ships to the defendants, and endorsements were made of those declarations upon the back of the policy. On the 14th February, 1859; before the preceding policy was fully appropriated, the plaintiffs effected a further policy of the same kind for 7000*l.*, with a memorandum "to follow and succeed policy 8th October, 1858." This policy was also appropriated by declarations endorsed thereon. A similar policy was effected by the plaintiffs with the defendants, dated the 31st March, 1859. On the 16th March, 1860, there remained 5000*l.* unappropriated upon this policy. On the same day a telegram, dated Calcutta, March 10th, arrived in London, and was known to the plaintiffs and defendants, viz., "Ship R. G. burnt and scuttled some cargo will be saved." On the 17th March the plaintiffs appropriated the remaining 5000*l.* upon the policy of the 31st March, 1859, to other ships. On the 19th March, 1860, the plaintiffs effected a further policy in the usual terms for 10,000*l.* to follow and succeed the policy of the 31st March, 1859. On the 21st March the plaintiffs in due course received instructions from the Calcutta agent, despatched on the 15th February, for an insurance on the R. G., and immediately notified to the defendants that the declaration of insurance in excess of 5000*l.* on the cargo of the R. G. would be

made upon the policy of the 19th March, and on the 26th March, having received the full particulars from Calcutta, endorsed on the policy a declaration of the amount in excess of 5000*l.* upon that ship. On the 24th March, 1860, before the last-mentioned policy was exhausted and while there remained upwards of 5000*l.* unappropriated upon it, the plaintiffs effected a further policy with the defendants for 20,000*l.* to follow the policy of the 19th March, 1860, and a memorandum was endorsed on the policy of the 19th March, 1860, as follows, "20,000*l.* to follow 25th March," such date being a mistake for the 24th March. Similar policies were from time to time effected during the currency of the preceding policy, and there remained upon the last of them an amount unappropriated more than sufficient to cover the amount for the R. G.

Held, that the plaintiffs were entitled to recover in respect of the excess over 5000*l.* upon the cargo of the R. G., inasmuch as: (1) The fact of the loss of the R. G. being known at the time of the policy of the 19th March, 1860, did not affect its validity; (2) it was not then known that the defendants' Company had any excess over 5000*l.* upon the cargo of the R. G.; and (3), *semble*, the plaintiffs would have been entitled to recover if it had been known.

THIS was an action to recover 2715*l.*, the amount of a partial loss, alleged to have attached under one or other of certain open policies on goods insured in the sum of 7699*l.* 1*s.* 3*d.*, whereof 4738*l.* was declared on policies by ship or ships in respect of the cargo of the ship Red Gauntlet, which was totally lost by fire at Calcutta; and the following special case was stated by an arbitrator pursuant to a Judge's order.

The plaintiffs are merchants in London, and act as the agents there of The Hong Kong Insurance Company. This Company is established at Hong Kong, and carries on the business of marine insurance there and elsewhere, and they have an agent established at Calcutta with general authority to underwrite policies on their behalf.

The course of business of the Company in taking risks at Calcutta, so far as it is material to this case, is as follows. Merchants at Calcutta intending to make consignments of merchandise, for example to the United Kingdom, and being desirous of securing insurances upon the same with the Company, make application to the agent of the Company some time before the goods are actually shipped, or even the name of the intended *ship is known, or the precise quantity or particulars of the merchandise is defined; and if the application is [*799 accepted a slip naming the risk accepted in general terms, but without naming the ship or specifying the particulars of the merchandise, is delivered to the assured, and as soon as the particular ship is determined on a formal policy of insurance, expressed to be upon the whole amount of merchandise which the assured may consign by that particular ship, is drawn up and delivered to him: what quantity of merchandise is covered by such policy remains uncertain until the same is actually shipped.

Under these circumstances the Company do not know at the time of issuing a policy of insurance what may prove ultimately to be the amount of risk taken by them on any particular ship, and not deeming it expedient to take upon themselves risks to a greater extent than 5000*l.* upon any one ship, the plaintiffs, as their agents in London, effect on their behalf with the defendants and others open policies of insurance to cover the several amounts, if any, which the Company may have taken in excess of 5000*l.* upon any one ship. The maximum amount of value to be insured in these policies is fixed therein.

In accordance with this course of business the plaintiffs effected a policy of insurance with the defendants, dated the 8th October, 1858, and numbered 22,112, for 7000*l.*, the subject of insurance being described and

valued as follows:—"Being on goods free of all average part of 10,000*l.* to cover the excess of 5000*l.* which may be taken by the Calcutta agent of The Hong Kong Insurance Company on any one ship warranted to *800] be shipped on or before 31st March, 1859." The ships *were described as being "first-class ship or ships as may be declared."

The Calcutta agent of The Hong Kong Insurance Company had taken risks on goods which exceeded 5000*l.* on single ships, and from time to time, as the plaintiffs received advices from the Company to that effect stating the names of the ships and the particulars of the amounts of excess on each, the plaintiffs made declaration of the amounts and names of the ships to the defendants, and endorsements were made of those declarations upon the back of the policy. [These endorsements were set out, the first being dated 13th November, 1858, and the last 16th March, 1859.] The particulars of the subjects of risks covered by this policy were thus, on the 16th March, 1859, completed, and the policy fully appropriated, or, as it is sometimes expressed, "consumed."

On the 12th February, 1859, before the last-mentioned policy was fully appropriated, the plaintiffs proposed to effect a further policy of the same kind for 7000*l.* This proposition was made by means of a memorandum which was endorsed on the back of the last-mentioned policy as follows:—"12th February. 7000*l.* to follow this;" and this proposal being accepted, a policy, numbered 3686/33, and dated February 14th, 1859, was effected for 7000*l.*, being expressed to be "on goods part of 10,000*l.* to cover the excess of 5000*l.* on any one ship free of all average to follow and succeed policy No. 22,112, 8th October, 1858, warranted to be shipped on or before 30th June, 1859." This policy was in like manner appropriated by declarations endorsed thereon as before, the last of which, being upon part value of a policy on ship W. W. Smith, was dated 7th November, 1859.

*801] *A similar policy was also opened by the plaintiffs with the defendants, numbered 7529/80, and dated March 31st, 1859, also for 7000*l.*, "being upon goods part of 10,000*l.* to follow and succeed policy No. 3686/33, dated 14th February, 1859, warranted to be shipped on or before 31st December, 1859," and a memorandum was endorsed on policy No. 3686/33 as follows:—"31st March. 7000*l.* to follow this at 30*l.*" On the 7th November, 1859, the first endorsement was made upon this policy, and was upon the remainder of the policy on ship W. W. Smith, partly appropriated by the last endorsement on the preceding policy.

On the 16th March, 1860, there remained still 5000*l.* unappropriated upon the open policy dated March 31st, 1859.

On the same day a telegram arrived in London by the Red Sea and India telegraph, having been despatched from Calcutta six days previously, containing the following message:—

"From Malta, dated 15, time 8 p. m.

"To Lloyd's, London.

"Ship Red Gauntlet bound to London burnt and scuttled some cargo will be saved. Calcutta, March 10.

"16.8.22 a. m.

LLOYD, Calcutta."

This telegram on the same day, the 16th March, 1860, was known to the plaintiffs and defendants.

On the 17th March, the plaintiffs, in accordance with the course of business, appropriated the remaining 5000*l.* upon the policy of March

31st, 1859, to insurances in excess of 5000*l.*, upon the ships City of Manchester, 2000*l.*, Blenheim, 2000*l.*, and Agamemnon, *1000*l.*; [*802 and on the same day the plaintiffs effected with the defendants three specific policies on behalf of The Hong Kong Insurance Company, one on goods per City of Manchester, for 3000*l.*, another on goods per Agamemnon, for 4000*l.*, and a third on goods per Blenheim for 2000*l.*, parts of the risks in respect of the cargoes of those ships having already been placed upon the open policy just appropriated.

On March 19th, 1860, the plaintiffs effected a further policy for 10,000*l.* to follow the policy of March 31st, 1859, which was expressed to be as follows:—"Being on goods free of average, &c., to follow and succeed policy No. 7529/80, dated 31st March, 1859, warranted to be shipped on or before 31st December, 1860." The plaintiffs, in the mode that had been previously pursued when the prior policies were effected, endorsed on the policy No. 7529/80 the following memorandum:—"10,000*l.* to follow 17th March at 30/." as instructions for the policy of the 19th March, 1860, and the defendants initialed the memorandum as an acceptance of the risk.

On the 21st March, 1860, the plaintiffs in due course received from the Calcutta agent of the Hong Kong Insurance Company the following instructions despatched from Calcutta on the 15th February, 1860:—"In our next by regular mail you will find particulars for insurances under our open policy for Red Gauntlet and Surrey." This was the first intimation received in England of any insurance by The Hong Kong Insurance Company upon Red Gauntlet.

The plaintiffs, immediately upon the receipt of these instructions from Calcutta, notified to the defendants that the declaration of insurance in excess of 5000*l.* on the cargo of The Red Gauntlet would be made upon the *last-mentioned policy when the particulars were received. [*803 Their right to declare in respect of The Red Gauntlet was how-ever disputed, and on the 26th March, the plaintiffs, having received advices from Calcutta that The Hong Kong Insurance Company, as the fact was, had taken risks upon the cargo of the ship Red Gauntlet to the amount of 4738*l.* in excess of 5000*l.* upon that one ship, endorsed a declaration of that amount per Red Gauntlet on the back of the policy of the 19th March, 1860, and gave notice of the same to the defendants. The defendants refused to accept or acknowledge that declaration upon the ground that the burning of The Red Gauntlet was known to both parties before the policy was effected or applied for; the plaintiffs thereupon wrote opposite the declaration per The Red Gauntlet the words "in dispute," and after doing so declared other risks upon the policy to the full amount, which were initialed by the defendants, but the words "in dispute" were not noticed by them.

The plaintiffs, on the 24th March, 1860, before the last-mentioned policy was exhausted and while there remained upwards of 5000*l.* unappropriated upon it, effected a further policy with the defendants for 20,000*l.* to follow the policy of the 19th March, 1860, and a memorandum was endorsed on the policy of the 19th March, 1860, as follows, "20,000*l.* to follow 25th March," such date being a mistake for the 24th March.

Similar policies were from time to time effected during the currency of the preceding policy, and there remained upon the last of them an

amount unappropriated more than sufficient to cover the amount for The Red Gauntlet.

*804] The interest of The Hong Kong Insurance Company *and the validity of the insurances were admitted, as well as the loss, and that the goods were shipped on board the ship, and that all warranties and conditions were complied with except so far as the same might otherwise appear on this case; and it was agreed that the amount to be recovered by the plaintiffs (if any) should be settled by an arbitrator to be named by the parties.

Copies of the policies were annexed to and formed part of the case.

The question for the opinion of the Court was Whether the plaintiffs were entitled to recover in respect of the excess over 5000*l.* taken by The Hong Kong Insurance Company upon the cargo of the ship Red Gauntlet.

Lush (*Hannen* with him), for the plaintiffs.—First. The policy effected on the 19th March, 1860, as a further policy, the preceding having been exhausted, is an open policy to cover all risks which The Hong Kong Insurance Company might take on any one ship in excess of 5000*l.* As soon as a ship was loaded to excess the risk was insured at Calcutta. The terms of a policy are “lost or not lost.” The loss was known to both parties on the 16th March, but that knowledge does not affect the policy, for neither of them knew that The Hong Kong Insurance Company had any interest in it. The merchant did not know by what ship his goods might come, and the successive policies being on the same subject-matter constituted one continuous insurance, and the risk would attach on each ship in the order of sailing.

Secondly. The declaration of the subject of insurance is not a condition precedent, and does not alter the *contract between the
*805] assured and the underwriter; though the assured cannot recede from his appropriation. [CROMPTON, J.—The policy is on any ship “as may be declared,” that is, to which the assured appropriate the risk; you seek to substitute the words “on ships in their order.”] The underwriter may fill up the policy as he pleases. The object of the assured was to have a policy which would cover every ship. When the ship sailed it would not be known whether the risk was in excess of 5000*l.* At any rate, as soon as the agent of the plaintiffs’ Company appropriated the risk at Calcutta the policy attached; and that appropriation was before the loss. The declaration is only a notification of the exercise of the power of appropriation, which is the act of the assured alone, and the underwriters have no power to reject any risk coming within the terms of the policy: *Harman v. Kingston*, 3 Camp. 150. The notification of it can only be given as soon as practicable according to the course of post. In *Harman v. Kingston*, 3 Camp. 150, the declaration was not communicated until after intelligence received of the loss. No doubt the goods were shipped under the policy, though it is not so stated.

Bovill (*Watkin Williams* with him), for the defendants.—First. The risk in respect of The Red Gauntlet was not covered by any of the policies; there was not one continuous policy or series of policies. The plaintiffs as agents of The Hong Kong Insurance Company deviated from the usual course in effecting the policy of the 19th March, 1860: there was no declaration when it was effected; and there was a break

between the 17th and the 19th March,—on the former day the current policy *was filled up and exhausted, and therefore for two days [*806 there was no policy covering the risk to which the declaration could apply. Every policy was in the nature of a new contract, it being optional with either party to make a fresh insurance. Suppose The Red Gauntlet had arrived in England, the plaintiffs would not have declared. But assuming the policy to take effect from the 17th March, that was after the loss of The Red Gauntlet, and both parties had knowledge of it. The risk taken by the defendants was in respect of the ship.

Secondly. The policy is to attach on ships to “be declared.” A declaration to have any validity must be communicated to the underwriters. In *Harman v. Kingston*, 3 Camp. 150, where a declaration of interest was necessary to make the policy a valued one, Lord Ellenborough held that a specification of interest not communicated to the underwriter was not such a declaration; the reason of which is that if the declaration were not communicated the assured might treat the policy as either open or valued, and the underwriter would not know which it was until the claim was made. The same reason applies here. [CROMPTON, J.—Here the object was to secure the plaintiffs’ Company during the whole of the voyage; and then the doctrine of Lord Ellenborough in *Harman v. Kingston*, 3 Camp. 150, does not apply. SHEE, J.—In that case the policy was held good as an open policy without a declaration.] Until the declaration is communicated to the underwriter there is no subject-matter on which the policy can attach, for in the interval the assured might revoke the declaration. [COCKBURN, C. J.—Lord Ellenborough does not say that there must be a communication of the declaration to the underwriter.] If a communication *to [*807 the underwriter were not necessary, the agent of the plaintiffs might shift the appropriation of the policy.

Lush, in reply.—The knowledge which vitiates a policy is a knowledge of the loss of the subject of insurance. Here neither party knew that the plaintiffs’ Company had any insurance, much less an excess, on the goods in the ship Red Gauntlet. But, if the underwriter chooses to effect a policy with full knowledge that the loss has actually happened, he is bound by it: *Mead v. Davison*, 3 A. & E. 303 (E. C. L. R. vol. 30). All the goods, or so much as would reduce the loss to less than 5000*l.*, might be saved: the loss insured by the policy is the contingency of the assured having any goods on board and of the loss exceeding 5000*l.*

The argument that a declaration cannot operate if made after the loss amounts to this, that the defendants do not insure any of the ships insured by the plaintiffs’ Company which do not arrive safe. The declaration may be made at any time or not at all: the intention of the party to make insurance is enough. Here the intention was evidenced by the letter of the agent sent off a month before the vessel sailed: that was an irrevocable appropriation, and from that time the risk attached. In 1 *Arnould on Marine Assurance*, 2d ed., pp. 219, 220, it is said, “With regard to the subsequent declaration by the assured of the name of the ship or ships when known to him, the practice generally is for the broker, on ascertaining the fact, to endorse the declaration of the name or names as a memorandum on the policy,” citing *Robinson v. Touray*, 3 Camp.

158, 1 M. & S. 217; and p. 221, "As a general rule, the name
*808] of the ship ought to be declared before notice of the loss: as,
however, cases may occur in which this would not be possible, as
where the assured does not ascertain the name of the ship, till he hears
of her loss, it is in no case a condition precedent to the plaintiff's right
to recover on the policy." [He was then stopped.]

COCKBURN, C. J.—We are agreed that our judgment should be for
the plaintiffs.

The first question is, whether there was a sufficient policy of which
the plaintiffs may avail themselves to recover for this loss. It is true
that the policy which applied to a risk of the assured on an insurance
of goods on board the *Red Gauntlet* was effected after the appropriation
at Calcutta. But it must be taken that the appropriation there (to be
followed by a declaration in London as required by the policy) was made
in anticipation of a policy to be afterwards effected in London; and
according to the course of dealing between the parties it was intended
that wherever the plaintiffs' principals, The Hong Kong Insurance
Company, from time to time became liable on insurances on goods in
any one ship for more than 5000*l.*, they should always be covered as to
the excess by an insurance with the defendants on the particular ship.
Mr. *Bovill* was not able to support his contention that if the policy had
been effected on the 16th March instead of the 19th, although equally
subsequent to the appropriation, it would not have been sufficient to
entitle the Company, on a proper appropriation and declaration, to have
the benefit of the insurance; but he said that even so the policy would
be invalid, because at the time it was effected the loss of *The Red
Gauntlet* was known. To this Mr. *Lush* gave a satisfactory answer,
*809] that, even if the plaintiffs, as agents of The Hong Kong Insur-
ance Company, had knowledge of the loss and the underwriter
had not, it could not vitiate the policy, because the loss of *The Red
Gauntlet* was not the risk insured against, but the risk depending on
the contingency that the principals of the plaintiffs had insured goods
on board that ship in excess of 5000*l.*, and at the time of the insurance
it was not known to the plaintiffs that their principals had any insurance
effected on *The Red Gauntlet*. But, be that as it may, the knowledge
here of the loss was common to both parties; and if an underwriter,
having knowledge of the loss of the subject-matter, chooses to insure, I
should not hold that he can afterwards repudiate the policy: he may
have good reasons for taking the risk on the chance that so much of the
cargo might be saved as the 5000*l.* would cover, and for the sake of
keeping up the course of dealing with the merchants.

The other question is, whether the declaration made to the underwriter
subsequently to the loss of the ship is sufficient. The policy gives the
assured the right to appropriate the policy to goods on board any ship,
but the ship is to be declared to the underwriter. Mr. *Bovill* contended
that the declaration must be made before the policy could attach; but
to put that construction on the agreement would frustrate the intention
of the parties, which was, that The Hong Kong Insurance Company
should be secured by re-insurance against risk in respect of an excess
over 5000*l.* on goods on board any particular ship. Whether they would
have a risk of more than 5000*l.* upon goods on board any particular
ship would not be known until the loading was complete and the vessel

about to sail. It was *admitted in the course of the argument that the appropriation which was then made by the agent of The [*810 Hong Kong Insurance Company at Calcutta could not be communicated to their agents here and through them to the defendants until about six weeks after; in the meantime the vessel would have sailed, and it could not have been intended that during part of the voyage the plaintiffs' Company should be unprotected. There are two constructions equally favourable to the plaintiffs, which, looking to the circumstances by the help of which we are to construe the instrument, we may adopt. First, by the declaration may be meant that appropriation should be made by some overt act from which the assured is not at liberty to recede, and that act, though done at Calcutta, makes the appropriation complete. Or, secondly, if the declaration must be made to the underwriters, it is sufficient if made and communicated to them at the earliest convenient opportunity; and then the underwriters are protected, because it would be a fraud on them if an appropriation were made to a vessel after knowledge of its loss, or if after the appropriation to one vessel there were an attempt to shift the policy to another. The declaration in some shape or other must be made in such a manner that the vessel shall be covered by the policy in the interval between the appropriation and the declaration to the underwriters. I am glad to find that the view taken by such a writer as Mr. Arnould, in the passage cited from his *Treatise on Marine Assurance*, p. 221, 2d ed., bears out this construction.

Mr. *Bovill* also argued that, assuming the plaintiffs could appropriate, they could not make the declaration have a retrospective operation, and would be prevented from *availing themselves of the right by the [*811 intermediate circumstance of the ship being lost. But if the assured have, as is admitted, a right to make the appropriation to any ship they choose, and to declare it afterwards, the object of the insurance would be defeated if they could not make the policy cover a risk from the commencement of the voyage.

CROMPTON, J.—The reasonable construction of the policy of the 19th March, 1860, is that it is to follow the preceding one of the 31st March, 1859, as it was a running policy so as to substitute 10,000*l.* for 7000*l.* as the amount by which the plaintiffs' Company should cover any excess over 5000*l.* on goods in ships coming from Calcutta to London, and so secure themselves during the whole voyage. It thus appears that they contemplated a renewal of the insurance, and intended the keeping up the old arrangement, so as to give the same rights under the new as under the preceding policy. Three ships are treated in a different way; but in this case the new policy follows the old open one, and it must have been intended to allow the assured to cover the interval after the risk under the preceding policy had run off and the fresh policy had been effected.

The main questions are, when did the risk on this policy attach? and was the declaration, if it be one, in time? I do not agree with Mr. *Lush* that the effect of the course of dealing and the form of the policies effected with the plaintiffs' Company is that the policies attached on the ships in the order in which they sailed; but I am much inclined to agree that the policy attached as soon as the risk was, as it were, appropriated to the defendants' policy by the agent in Calcutta. The goods [*812 *insured are loaded on board a ship to be named, and the policy,

which is on goods, not on the ship, probably attaches on the appropriation being made abroad, and not on the loading of the goods. But, at any rate, the appropriation, made by letter from the agent at Calcutta, and acted on by the plaintiffs in London forthwith communicating it to the defendants, was a declaration of the risk in good time. It is impossible that the parties could mean that during any part of the voyage the risk should not be covered, which would be the case if the construction contended for by Mr. *Bovill* were adopted. The ship must be named before the assured can recover; it is probably sufficient to name it in London at once according to the instructions received from abroad; and I adopt the language of Lord Ellenborough, in *Robinson v. Touray*, 3 Camp. 158, 159, that the declaration of the ship on which the policy is to attach is the exercise of a power conferred upon the assured, which may be exercised at any time so long as it can be done innocently and without fraud. Here the appropriation was made *bonâ fide* at Calcutta, and when the instructions were carried out by the plaintiffs in London, there was no fraud, concealment, or other default which vitiates a policy. This construction agrees with the passage cited from 1 *Arnould on Assurance*, p. 221, 2d ed., which is quite right.

MELLOR, J.—The first question, what is the nature of the contract between the plaintiffs' Company and the defendants, is to be determined from the documents and the course of dealing between the parties with reference to which the policies were effected. The object on the part of *813] the defendants was to protect themselves *against a double appropriation, and that on the part of The Hong Kong Insurance Company was to be always secured against any excess over 5000*l.* on goods on board any one ship.

As to the knowledge of the loss of the ship, I agree with the explanation of Mr. *Lush*, that this was not the sort of loss contemplated by the parties in these policies, and, therefore, it makes no difference in the construction of the instrument. I concur in the judgments which the Lord Chief Justice and my brother Crompton have delivered.

SHEE, J.—The defendants, by the contract in the policy of the 19th March, 1860, have undertaken to insure the excess of risk above 5000*l.* on any insurance that may be taken by the plaintiffs' Company on goods in any ship from Calcutta to London, to be shipped on or before a certain date, on ships of a certain class, and to be declared. The *Red Gauntlet*, on board of which goods had been insured by the agent of the plaintiffs' Company at Calcutta for an excess above 5000*l.*, was one of those ships: it had sailed on the voyage, so that, according to the plain meaning of the words of the contract, the excess of the risk would be within the meaning of the contract. At the time the policy of the 19th March, 1860, was effected, it was known to both parties that the *Red Gauntlet* had been lost, but it was not known to either that she was one of the ships on which any risk, much less a risk in excess of 5000*l.*, had been taken by the plaintiffs' Company; and in order to vitiate the policy, there must at all events be a knowledge that the particular risk insured *814] *against had occurred. Then it is said that the meaning of the policy being on ships to "be declared" is that the underwriters are to have an option to refuse when the declaration is made; but that cannot be the construction of the contract, for the underwriters undertake to insure any excess "on any one ship" of a particular class sail-

ing before a particular time; and the engagement to declare can only mean that as soon as an excess over 5000*l.* has been taken by the plaintiffs' Company, they will declare the name of the ship to which they apply the defendants' open policy; and the event on which the policy must attach is the naming of the risk at Calcutta.

I am also of opinion that the defendants cannot get out of the contract by reason of The Red Gauntlet having been lost and that fact being known at the time of the declaration, unless it was known that the plaintiffs' Company had an excess of insurance on that ship.

Judgment for the plaintiffs.

*CALEY, Appellant, The Local Board of Health for the Borough of KINGSTON UPON HULL, Respondents. [*815
Nov. 16.

Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 69.—Levelling street not a highway.

By sect. 69 of the Public Health Act, 1848, 11 & 12 Vict. c. 63, in case any street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such Board may, by notice in writing to the owners or occupiers of the premises fronting, &c., such parts as require to be sewered, levelled, &c., require them to sewer, level, &c., the same; and if the notice be not complied with the Board may execute the works mentioned therein; and the expenses incurred shall be paid by the owners in default.

1. Held, that the Local Board had no power to require the owner of a house to alter the part of the street which his house fronted so as to make it correspond with the level of adjoining streets.

2. *Semble*, by Cockburn, C. J., that the Local Board have power to require the level to be altered for the purpose of channelling.

CASE stated by the Stipendiary Police Magistrate for the borough of Kingston upon Hull, under stat. 20 & 21 Vict. c. 43.

At a Petty Sessions holden for that borough an information and complaint, preferred by the respondents against the appellant under sect. 69 of The Public Health Act, 1848, 11 & 12 Vict. c. 63, charging that he did unlawfully neglect and refuse to pay to the respondents the sum of 9*l.* 19*s.* 5*d.*, being the amount due from him for expenses incurred by them in levelling and flagging the west side of a certain street called Park Street, late College Street West, was heard and determined; and the appellant was ordered to pay to the respondents the sum of 9*l.* 19*s.* 5*d.* for those expenses (to be recovered under the Act under the name of improvement rates), and the further sum of 6*l.* 14*s.* for costs.

The case stated that the street in question was staked *out in 1840; that an ancient footway passed along the east side of it, [*816 and was higher than the street; that in 1841 the first house was built on the west side, and between that date and 1852 the remaining houses were built, forming that side; flagging was added before each house as it was built, such flagging being much lower than the footpath on the east side, and very irregular, and the intervals between the houses were unflagged; that recently the street, which had been a cul de sac, was continued so as to communicate with and form part of a new street, but the arrangement for taking the levels of the street in question had not been made subservient to the levels required by the continuation of the street, nor vice versa; that memorials had been presented to the Board,

from the occupiers and some of the owners of houses in the street and neighbourhood, complaining of the state of the street, and begging that measures might be taken for the speedy repair of the road; and specific complaints had also been made by some of the owners of houses on the west side as to the state of the flagging.

In consequence of these complaints, and of the dissatisfaction felt by the Board at the continued bad state of the flagging on the west side, they served the following notice upon the appellant, on the assumption that the requirements therein contained were justified by stat. 11 & 12 Vict. c. 63, s. 69.

“Local Board of Health for the borough or district of Kingston upon Hull, in the county of the same borough or district.

“To Mr. George Caley, the owner of certain premises fronting, adjoining, or abutting upon a certain street heretofore called College Street West, and now Park Street, within the said borough or district.

*817] “Whereas the said street is not levelled, curbed and flagged to the satisfaction of the above-named Local Board of Health. And whereas your said premises front, adjoin or abut on certain parts of the said street which require to be levelled, curbed and flagged. Now, therefore, the said Local Board of Health hereby give you notice (in pursuance of the statute in that case made and provided) to level, curb and flag the same within the space of twenty-eight days from the date hereof in manner following, that is to say: A foundation for the footway in and on the west side of the said street, to be formed in the following manner: a bed of sand two inches in thickness to receive the flagging, of six inches of strong gravel or broken chalk for the kerb stone; the ground for receiving the above to be raised to the proper level with dry materials well punned.” (a) [The notice then specified the flagging and kerbing to be done.] “The whole of the above-mentioned works to be executed by you in accordance with the plans and sections of the works prepared by the surveyor of the said Local Board, and now lying for inspection by you at the office of the said Local Board, situate in Worship Street, in Kingston upon Hull aforesaid, and the dimensions, widths and levels shown thereon, and to be done in a good workmanlike and substantial manner to the satisfaction of the said Local Board or their surveyor.

“Dated this 27th January, 1863.

(Signed)

“C. S. TODD,

“Clerk to the said Local Board.”

In consequence of the neglect or refusal of the appellant to perform the works required by the notice the Board carried the works out, and *818] the expense was *duly assessed, and the appellant's portion found to be 9*l.* 19*s.* 5*d.*, which he refused to pay.

The case was accompanied by two plans, one of which showed the line of the street in question and other adjoining streets, and the other showed the course of the old, uneven, defective flagging in the street in question and the new level formed by the Board: the soil of the foot-path had been raised opposite to the appellant's house about six inches.

The appellant offered two grounds of defence: first, that College Street was a highway, but the proof of that having failed, this ground

(a) A technical word, signifying “rammed down.”

was abandoned; and, secondly, treating College Street West as a private street, he denied the power of the Board to require him to do the works specified in the notice. He contended that the words "level" and "flag," in sect. 69, did not authorize the Board to call upon him to raise the soil of the footpath, but only to smooth its surface in front of his house and flag upon such smoothed surface; that, if the word "level" empowers the Board to ask him to raise or lower the general level of the street, they might go on changing the level and even call upon the owner to construct a viaduct to overlook and injure his own property; that the words "level" and "flag" could not have been intended to include a power to raise or lower the soil, for in the 68th section, which relates to highways vested in the Board, the same words are used; but in that section it was thought necessary to add an express power to raise or lower the soil of the streets; that in sect. 69 the Legislature had restricted the power of the Board in private streets, because the works therein specified were to be done at the expense of the owner; and that if the Board wished to raise or lower *the surface of the streets [*819 they could do so by declaring the street a highway under sect. 70, and then exercising the powers of raising and lowering it given by the 68th section, which would entitle the owners to compensation if injury were done to them.

The question for the opinion of the Court was, Whether the Board of Health had power to call upon the appellant to perform the works specified in the notice, so far as they necessitated a raising of the soil under the flagging in front of the appellant's house under stat. 11 & 12 Vict. c. 63, s. 69.

Stat. 11 & 12 Vict. c. 63, s. 69, enacts, "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such Board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said Local Board may, if they shall think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said Local Board to be private *improvement expenses, and be recoverable as such in the manner [*820 hereinafter provided."

Tindal Atkinson, Serjt. (*Arthur Peel* with him), for the respondents.

T. P. E. Thompson, for the appellant, was not called upon.

COCKBURN, C. J.—Here the Local Board have raised the entire level of the footway throughout. It might be necessary to alter the entire level of a street for the purpose either of sewerage or of channelling, so that the level should correspond with that of other streets in the surrounding neighbourhood. If the levelling in the present case was for the

former purpose the Board have exceeded their power. Under sect. 69 they have power to require the appellant to do anything necessary to make the level of the street uniform, looking at it by itself as isolated from other streets; if, for instance, there are inequalities in it producing collections of stagnant water or other nuisance they may order him to level them, but they have no power to cast on the owners of houses the burden of raising the level of the street to the level of streets continuing or crossing it. If this levelling had been incidental to the channelling of the street I am disposed to think it would be within their power. But the case does not so find.

CROMPTON, J.—It is an excess of power in the Local Board to make an embankment or a cutting which may interfere with houses either by weakening their foundations or interfering with their lights. The words *821] of sect. 69 are ambiguous, but clearly they are not sufficient to make it compulsory upon the owners of houses to raise or lower their parts of the street so as to correspond with the level of the surrounding district.

MELLOR, J.—Looking at the notice in writing to be given to the owners or occupiers of houses, the powers of the Local Board when they take upon themselves to execute the works are confined to the removal of inequalities in the surface and other objects required for the particular street, considered by itself and separate from the neighbouring streets.

SHEE, J., concurred.

Conviction quashed.

The QUEEN v. The Inhabitants of the Township of DENTON. Nov. 22.

Non-repair of highway being turnpike road.—5 & 6 W. 4, c. 50, s. 98.—3 G. 4, c. 126, s. 110.—*Indictment.*—*Pleading guilty.*—*Costs.*

Stat. 5 & 6 W. 4, c. 50, s. 98, empowers the Court before whom an indictment for non-repair of a highway is preferred to award costs to the prosecutor if it shall appear to the Court "that the defence made" was frivolous or vexatious. By stat. 3 G. 4, c. 126, s. 110, when a parish is indicted for not repairing a highway being turnpike road, and the Court shall impose a fine for the repair of the road, such fine shall be apportioned, together with the costs attending the same, between the parish and the trustees, &c. An indictment was found against the inhabitants of a township for non-repair of a highway, which was also a turnpike road, and the defendants pleaded guilty, having three days before the Assizes given notice of their intention to do so, and a fine was imposed, the levying of it being respited to a subsequent Assizes. At those Assizes the Judge made an order, which, after reciting that it did not seem just that the fine should be apportioned between the inhabitants of the township and the turnpike trustees, ordered that a sum sufficient for the repair should be levied upon the inhabitants of the township; and, after further reciting that the defence made was frivolous, awarded costs to the prosecutor. Held, that the Judge had no power, under either enactment, to make that part of the order which related to costs.

*822] *In Trinity Term *Milward* obtained a rule nisi for a certiorari to bring up the following order of Willes, J., for the purpose of quashing so much of it as ordered the payment of costs.

"At the Session of Assizes, oyer and terminer, and gaol delivery, held at Liverpool, in and for the county palatine of Lancaster, on Thursday, the 17th day of March, A. D. 1864:

"Whereas at the Session of Assizes, oyer and terminer, and gaol delivery, held at Liverpool aforesaid, in and for the said county palatine,

on Saturday, the 21st day of March, A. D. 1863, the inhabitants of the township of Denton, in the parish of Manchester, in the said county, were and stood indicted for not repairing a certain part of a common and public Queen's highway, to wit, a highway leading from, &c., unto, &c., used by and for all the liege subjects of our lady the Queen, with their horses, coaches, carts, and carriages, to go, return, pass and repass, ride and labour, at their free will and pleasure, paying certain toll and tolls in that behalf respectively, which said part of the said Queen's highway, situate in the said township of Denton, begins at, &c., and extends thence, &c. And whereas at the Session of oyer and terminer and gaol delivery, held at Liverpool aforesaid, in and for the said county palatine, on Saturday, the 8th day of August, A. D. 1863, into Court came J. I. and P. R., two inhabitants of the said township of Denton, and on behalf of themselves and the rest of the inhabitants of the same township submitted to the said indictment, and a fine of 1000*l.* was thereupon imposed and laid by the Court there upon the inhabitants of the said township of Denton for not repairing the *said part of the said highway. And it was ordered by the said Court there that the said fine should not be levied until leave for [*823 that purpose should be given by the justices of our said Lady the Queen at the then next Session of Assizes, oyer and terminer, and gaol delivery, to be held at Liverpool aforesaid, in and for the said county palatine, and that such last-mentioned justices, at such then next Session as aforesaid, should have full power to remit the whole or any part of the said fine, and to direct the same to be levied or not, and further to respite the matter of the said indictment to the Session of Assizes, oyer and terminer, and gaol delivery, which should be held at Liverpool aforesaid in and for the said county palatine next after the said first-mentioned next Session. And it was by agreement between the respective counsel for J. H., the prosecutor of the said indictment, and for the inhabitants of the said township of Denton, further ordered by the said Court, that the justices at the said first-mentioned next Session should have the same power over the costs of and relating to the matter of the said indictment as the said Court then had. And whereas at the Session of Assizes, oyer and terminer, and gaol delivery, held at Liverpool aforesaid, in and for the said county palatine, on Wednesday, the 9th day of December, A. D. 1863, being the Session of Assizes, oyer and terminer, and gaol delivery, held at Liverpool aforesaid in and for the said county palatine next after the said Session held there on the said 8th day of August, 1863: It was ordered by the Court and justices there, that the matter of the said indictment should be respited until the then next Session of Assizes, oyer and terminer, to be held at Liverpool, in and for the said county *palatine. And now, at this [*824 same Session of Assizes, oyer and terminer, and gaol delivery, held at Liverpool, in and for the said county palatine, on Thursday, the 17th day of March, A. D. 1864, being the Session of Assizes, oyer and terminer, and gaol delivery, held at Liverpool aforesaid, in and for the said county palatine, next after the said Session held there on the said 9th day of December, A. D. 1863, the same two inhabitants of the said township of Denton personally appeared in Court then and there, for themselves and the rest of the inhabitants of the said township of Denton, to receive the judgment of the Court on the said indictment, and

to perform what the same Court should enjoin in that behalf. Whereupon, and upon reading the several affidavits, &c., and upon hearing counsel, &c., it is ordered by the Court and justices here that the said fine of 1000*l.* so imposed and laid upon the inhabitants of the said township of Denton as aforesaid do stand and be confirmed. And the said highway being a turnpike road, and it not seeming just to the said Court and justices here, upon consideration of the circumstances of the case, that the said fine ought to be apportioned between the inhabitants of the said township of Denton and the trustees of such highway and turnpike road; and that, from the circumstances of the debt and revenues of such highway and turnpike road, an apportioned part of the said fine cannot be paid by the treasurer of the said highway and turnpike road out of moneys now in his hands or next to be received by him, without endangering the securities of divers creditors who had advanced their money upon the credit of the tolls to be raised therefrom: It is ordered and directed by the said Court and justices here that the said fine shall *825] be *levied upon the goods and chattels of the inhabitants of the said township of Denton by and be paid into the hands of W. R., land surveyor, the said W. R. being a person residing in the said parish of Manchester, where the said part so indicted of the said highway and turnpike road doth lie; and that a writ of *levari facias*, for levying the said fine accordingly, be issued and directed to the said W. R., and that the said writ be endorsed with a direction to the said W. R. to enforce the same to the extent of 467*l.* only, exclusive of the costs and charges of executing the said writ, which said sum of 467*l.* appears to the said Court and justices here to be a sufficient sum for putting the said part so indicted as aforesaid of the said highway and turnpike road into proper repair; and that the said sum of 467*l.*, when so levied and paid as aforesaid, be applied by the said W. R. towards the repair and amendment of the said part of the said highway and turnpike road. And it appearing to the said Court and justices here that the defence made by the inhabitants of the said township of Denton to the said indictment is frivolous; and the said Court and justices here having therefore awarded costs to the said J. H., the prosecutor of the said indictment, to be paid by the inhabitants of the said township of Denton; and having directed the amount of such costs to be ascertained and taxed by the proper officer of the said Court, and the same having accordingly been ascertained and taxed by him at the sum of 129*l.* 12*s.* 7*d.*: It is further ordered by the said Court and justices here that the said sum of 129*l.* 12*s.* 7*d.*, being the amount of the said costs so ascertained and taxed as aforesaid, be paid by the inhabitants of the said township of Denton to the said J. H., the prosecutor of the said indictment."

*826] *It appeared from the affidavits that the indictment was preferred at the instance of the trustees of the Manchester, Hyde and Mottram turnpike road. Three days before the commission day of the Summer Assizes, 1863, notice was given by the attorney for the defendants to the prosecutor, who was the surveyor of the trustees, that they intended to plead guilty.

Manisty and *Hopwood* showed cause.—The General Highway Act, 5 & 6 W. 4, c. 50, s. 98, enacts, "That it shall and may be lawful for the Court before whom any indictment shall be preferred for not repairing highways to award costs to the prosecutor, to be paid by the person

so indicted, if it shall appear to the said Court that the defence made to such indictment was frivolous or vexatious." An indictment having been found against the defendants they conducted themselves so as to lead the prosecutor to believe that they were defending it, and so put him to unnecessary expense. In *Reg. v. The Inhabitants of Haslemere*, 3 B. & S. 313 (E. C. L. R. vol. 113), where, the defendants having pleaded guilty, the Judge made an order for costs under sect. 95, the Court said, p. 319, "It appears to us impossible to suppose that a difference can have been intended to be made between a case where the defendants plead not guilty, and a trial thereupon takes place, and one in which, on the bill being found, the defendants, desisting from further resistance, plead guilty to the indictment." [COCKBURN, C. J.—Under sect. 95, on the hearing of the summons the inhabitants must deny their liability to repair before the justices can direct an indictment to be preferred. There are words in that section which enabled us to give effect to what we deemed to be the intention of the Legislature. But can we say that a person who, on the earliest occasion on which he is bound to plead, pleads guilty, makes a frivolous or vexatious defence? MELLOR, J.—In the present case, the prosecutor went to the Assizes to aggravate the amount of the fine to be imposed on the defendants, and the defendants went there to mitigate it.] The order recites that there was a defence and that it was frivolous. [COCKBURN, C. J.—An inferior Court cannot give itself jurisdiction by finding a fact which did not exist.] By The General Turnpike Act, 3 G. 4, c. 126, s. 110, when a parish is indicted for not repairing a highway being turnpike road, and the Court before whom such indictment shall be preferred shall impose a fine for the repair of the road, such fine shall be apportioned, together with the costs attending the same, between the inhabitants of the parish and the trustees or Commissioners of the turnpike road, and the Court is empowered to order the treasurer of the turnpike road to pay the sum proportioned for the turnpike road out of the money in his hands or next to be received by him, if it shall appear from the circumstances of the turnpike debts and revenues that the same may be paid without endangering the securities of the creditors. [COCKBURN, C. J.—That is, if costs have been awarded; but, if there was no power to order costs prior to that statute, it cannot have been intended to give the power incidentally when the highway appeared to be also a turnpike road; besides, are the costs there mentioned the costs of the indictment or of the apportionment? MELLOR, J.—Under stat. 3 G. 4, c. 126, the order should apportion the fine and the costs.] *The order in question recites why the Judge did not apportion the fine. [*827

Mellish and *Milward*, who appeared in support of the rule, were not called upon.

COCKBURN, C. J.—This order proceeds on stat. 5 & 6 W. 4, c. 50, s. 98. I regret that there should not be a power, which if there had been would have been rightly exercised in the present case, to award costs to the prosecutor where the defendants plead guilty to an indictment for non-repair of a highway. When an indictment is preferred and process goes to bring in the defendants, and they say nothing until they come into Court, in obedience to process, and then plead guilty, that does not constitute a "defence." We must understand that word in its ordinary sense as meaning something which a man does in order to defend himself.

from the legal consequences of the proceedings instituted against him. This is a *casus omissus* and we cannot legislate for it.

CROMPTON, J.—The first appearance of the defendants in Court was for the purpose of submitting to judgment on the indictment. It is impossible to say that not giving notice of their intention to submit until three days before the Assizes was a defence. The present case is neither within the words of stat. 5 & 6 W. 4, c. 50, s. 98, nor of stat. 3 G. 4, c. 126, s. 110.

MELLOR, J.—The provision of stat. 3 G. 4, c. 126, s. 110, was intended in aid of a parish indicted for the repair of a highway which was a turnpike road when judgment was given for the prosecutor. The *829] counsel for *the prosecutor wants to apply that section to the case of an indictment against a parish prosecuted by turnpike trustees.

SHEE, J., concurred.

Rule absolute.

PYE v. BUTTERFIELD and Others. Nov. 25.

Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 51.—Interrogatories.—Ejectment.—Forfeiture of lease.

In ejectment by landlord against lessee to recover possession of premises and enforce a forfeiture by reason of the defendant having underlet, the Court will not allow the plaintiff under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 51, to deliver interrogatories to the defendant, where the answers might subject him to a forfeiture of his interest as lessee.

THE plaintiff having brought an action of ejectment against several persons, including the defendant Butterfield, to recover possession of a house in Clifford Street, held on lease, in the county of Middlesex, he appeared to defend the action.

Afterwards the plaintiff, in pursuance of an order of Shee, J., delivered the following among other interrogatories to him under The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 51.

“Have you at any time assigned or otherwise parted with the said lease to any one, and if so, to whom, and where, and when?”

“Have you underlet or in any way or manner parted with the possession of the said house and premises, or any part thereof, and if so, state when, and to whom, and for how long?”

“Have you underlet the said house and premises to Mr. Grant Heatley Tod Heatley, and if so, when, and under what circumstances, and for what purpose?”

*830] “Do you receive any, and if any, what rent for the said house and premises, and if so, from whom, and how much?”

“Who is now in possession of the said house and premises, and is the person in possession there by your authority and permission, and did he derive his possession through you?”

“Have the said house and premises been let by you to be used as a club, or used for such purpose, with your permission and authority?”

The defendant Butterfield answered:

To the first of these interrogatories, that he was lessee under the plaintiff of the house and premises in Clifford Street, and that the lease was in his possession.

To the others, that the action was brought to recover possession of the premises in question, which were held by him as tenant of the plaintiff under a lease dated the 24th March, 1857, for twenty-one years, containing a covenant on his part not to assign over or underlet, or in any way or manner part with the possession of the premises for any time during the term granted to any person or persons without the license and consent in writing of the plaintiff, his executors, administrators or assigns for that purpose first had and obtained, and providing that if he should not well and truly observe and keep the said covenant, and all and every the covenants, clauses, and agreements contained in the lease, it should be lawful for the plaintiff, at any time or times thereafter, into and upon the said premises, or any part thereof in the name of the whole, wholly to re-enter and the same to have again as in his first and former estate. And that the plaintiff was seeking to recover possession of the same premises, and to enforce a forfeiture by reason of the defendant *having underlet them to Grant Heatley Tod [*831 Heatley and Alexander Dolland. And he objected to answer the interrogatories, on the ground that his answers might subject him to a forfeiture of his interest as tenant and lessee of the premises.

In this Term, *Needham* obtained a rule, calling upon the defendant to show cause why the plaintiff should not be at liberty to deliver to the defendant Butterfield or his attorney interrogatories in writing, and why the defendant should not answer within four days the questions in writing by affidavit. [He referred to stat. 46 G. 3, c. 37, 2 Phill. Ev., 10th ed., 492, *May v. Hawkins*, 11 Exch. 210; *Chester v. Wortley*, 17 C. B. 410 (E. C. L. R. vol. 84); *Bartlett v. Lewis*, 12 C. B. N. S. 249 (E. C. L. R. vol. 104); *Blyth v. L'Estrange*, 3 F. & F. 154.]

Laxton showed cause.—The Court will not compel the defendant to answer the interrogatories in question. This point arose in *May v. Hawkins* and *Chester v. Wortley*, but was not decided. In the former however, which was ejectment for forfeiture of a lease by breach of covenant to repair, Parke, B., said, p. 213, "I am sorry that the case should be decided upon the minor point; for it is very much to be desired that the Court should be in a position to decide the principal one. I shall continue to pursue the principle I acted upon in this case at chambers, by refusing to allow interrogatories which are framed with a view to deprive a man of his estate. I believe that this principle is always recognised in the Courts of Chancery, and I shall continue to act upon it until there is a decision to the contrary in the superior Courts." And Martin, B., said, *"I take the same view of the [*832 matter as my brother Parke. I think it would be monstrous to allow this enactment to be used for the purpose of fishing out information in a matter of such a penal character as the present." The defendant is in the position of a witness at a trial; and stat. 46 G. 3, c. 37, declares that "a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture, of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of His Majesty, or of any other person or persons." [COCKBURN, C. J.—That statute was passed in consequence of the difference

of opinion on the question proposed by the House of Lords to the Judges on the occasion of Lord Melville's trial; (a) no question arose there about real estate. The word "forfeiture" being associated with "penalty" points to cases in which a man pays a sum of money on conviction of an offence.] In 2 Phill. Ev., 10th ed., p. 492, it is said:—"The declaratory statute, 46 G. 3, c. 37, implies, that a witness may legally refuse to answer a question, which has a tendency to expose him to a penalty or forfeiture of any kind whatsoever." [COCKBURN, C. J.—That passage merely follows the words of the statute.] It is added, "In Courts of equity, it is an established principle, that a party is not bound to answer, so as to subject himself to pains or penalties, or to any kind of punishment, or to any forfeiture of interest." The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 51, only empowers *833] the plaintiff and the defendant to deliver to the opposite party *—"interrogatories in writing upon any matter as to which discovery may be sought." And this Court will follow the principle adopted in the Court of Chancery, where "the plaintiff is *not entitled* to an answer" to a question "if the answer would prove the defendant guilty of a forfeiture of interest strictly so called. But the objection does not apply to the mere determination of an interest by force of a limitation:" Wigram on Discovery, 2d ed. pp. 80-1. "It has been also observed, that no person is bound to answer so as to subject himself to any forfeiture, or to anything in the nature of a forfeiture:" Mitford Pleadings in Chancery, 5th ed., p. 333, citing *Fane v. Atlee*, 1 Eq. Cas. Abr. 77, pl. 15, and at p. 233, *Lord Uxbridge v. Staveland*, 1 Vez. Sen. 56. "There are several decisions to show that, in allowing interrogatories, the Court will adhere to the established principles of evidence. . . . So the party to whom they are administered possesses the privilege of other witnesses, and consequently will not be compelled to state the contents of, or describe documents which are his muniments of title, or, as it seems, answer questions tending to criminate him, or expose him to penalty or forfeiture:" Best on Evidence, 3d ed., pp. 756, 7. "It has already been casually observed, that some questions a witness is *not compellable to answer*. First, this is the case, where the answers would have a *tendency* to expose the witness or, as it seems, the husband or wife of the witness, to any kind of *criminal charge*, whether in the common law or Ecclesiastical Courts, or to a *penalty* or *forfeiture* of any nature whatsoever. This rule, which is of great antiquity, and was even recognised by Chief Justice Jefferies when it told *against* the prisoner, is not confined to Courts of law, but is also *834] administered in *Chancery, where a defendant will not be compelled to discover that, which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure, however material the answer may be to the plaintiff's case. Neither will a witness in equity be forced to answer interrogatories of a like tendency. The same doctrine prevails in the spiritual Courts, and is part and parcel of the law of Scotland:" 2 Taylor on Evidence, p. 1236, 4th ed. These interrogatories are more in the nature of a bill of discovery than matter of *Nisi prius* evidence.

Needham, in support of the rule.—In *May v. Hawkins*, 11 Exch. 210, the decision simply was that the affidavit in support of an application

(a) See 1 Stark. Ev., 3d ed., 190, note (c).

for leave to deliver interrogatories to a defendant under stat. 17 & 18 Vict. c. 125, s. 51, must state that the plaintiff has a good cause of action. In the present case there was no affidavit of merits. *Chester v. Wortley*, 17 C. B. 410 (E. C. L. R. vol. 84), merely decides that the time of taking the objection to interrogatories is when the answer is to be given on oath. Courts of equity have always exercised a discretion as to allowing a bill of discovery in cases of forfeiture. In *Hare on Discovery of Evidence*, p. 145, it is stated, "If the bill seek a discovery of facts which would show that the defendant never had an interest in the property which he wrongfully retains; or, having had an interest, that it has ceased by the taking effect of some limitation over; the defendant will not be permitted to set up the loss of possession which the proof of these facts would occasion, as a ground for withholding discovery." And in *Lucas v. Evans*, 3 Atk. 260, where A. by his will give his wife the surplus of his personal estate, but on condition that if she married again she should *give up half to his brother; and a bill was filed to discover whether she was married, a demurrer to the bill, on the ground [*835 that a forfeiture would be incurred, was overruled. [COCKBURN, C. J.—The ground of decision in that case is thus stated by Lord Hardwicke, "It is within the rules and distinctions in former cases; where it is a conditional limitation over of an estate, there the person must show that they have performed the condition, and cannot demur to a bill for discovery of it."] The provision in stat. 46 G. 3, c. 37, applies to "forfeiture" in the nature of a penalty, according to the definition of that term in 2 Bl. Com. 267; and the words "of any nature whatsoever" do not extend its signification. [COCKBURN, C. J.—Stat. 46 G. 3, c. 37, refers to witnesses, not to parties in the cause, and therefore has no application here, except as a guide to our discretion.] Stat. 17 & 18 Vict. c. 125, sect. 51, entitles a party to deliver interrogatories "upon any matter as to which discovery may be sought;" that is, on which the party requires information: there is no reference in terms to a Court of equity or its practice, and it was not intended to limit the Courts of law in administering interrogatories by the principle adopted in Courts of equity in allowing a bill of discovery. In *Bartlett v. Lewis*, 12 C. B. N. S. 249 (E. C. L. R. vol. 104), Erle, C. J., said, p. 261, "Nor do I infer from the language of the 51st section that it was intended that the practice of the Courts of equity was to regulate us. It provides that interrogatories may by order of the Court or a Judge be delivered 'upon any matter as to which discovery may be sought.' I think the Legislature has cautiously abstained from limiting the power of administering interrogatories to cases where a bill for discovery will lie." And Willes, J., p. 262, "It is only [*836 *necessary to look at the frame of the 51st section to see that it was intended that this new jurisdiction should be administered in the Courts of law by analogy to their own proceedings, and not to the practice of the Courts of equity." [COCKBURN, C. J.—If the Judges of the Court of Common Pleas meant to say that there are cases in which we should allow interrogatories where the Court of Chancery did not allow a bill of discovery, I agree; but if they meant to say that we should set at nought the principle on which interrogatories are administered in the Court of Chancery, I am not satisfied to follow their dicta.] Courts of common law have already gone farther than Courts

of equity were accustomed to go: thus, the latter would not grant a bill of discovery in aid of an action for a mere personal tort, *Mitford Pleadings in Chancery*, p. 230, note (1), 5th ed., citing *Glynn v. Houston*, 1 Keen 329, 337; whereas the Courts of common law have allowed interrogatories in such an action. In *Peppiatt v. Smith*, 3 H. & C. 129, they were not allowed because the facts sought to be elicited formed part of the plaintiff's case. [COCKBURN, C. J.—That species of wrong is not within the jurisdiction of the Court of Chancery.]

COCKBURN, C. J.—This rule must be discharged. I do not think that stat. 46 G. 3, c. 37, which limits the privilege of witnesses in refusing to answer questions, applies to the present case; and, if it did, I doubt whether the word "forfeiture," as there used, has reference to a forfeiture arising on a contract between two persons, by which one of them is to have possession of the property of the other if a breach of the contract is committed, though in professional language that is *called *837] a forfeiture. But I rest my judgment on the ground that, in suits pending in the Courts of common law, the exercise of authority given by The Common Law Procedure Act, 1854, sect. 51, must be governed by those principles which for a long series of years have been recognised in Courts of equity, where the law as to discovery has grown up and been matured. The Legislature have invested the Courts of law with this authority, in order that parties might get relief without incurring the additional expense of going to a Court of equity. They must be taken to have done this with full knowledge of the principles and rules according to which this subsidiary power had always been administered in Courts of equity; and, as they have not expressly given larger power, they may have intended that it should be exercised with the same limitations. But, whether we are fettered or left free to exercise our judicial discretion, we ought to abide by the principle on which this branch of jurisprudence has for centuries been administered in Courts of equity. It is clear, from the decisions in those Courts which have been cited, and the expressions used by eminent text writers, that it is a fixed rule that no bill of discovery will be allowed when the answers may have the effect of causing a forfeiture of estate, except where the estate is held on a conditional limitation, in which case it would be extinguished on non-performance of the condition. This may be a fine-drawn distinction; but whatever we may think of the rule, it is too well established to admit of doubt. Courts of equity have exercised no discretion when a case falls within the rule: the present case is within it, and therefore we ought not to allow the plaintiff to administer these interrogatories in violation of the principle so established.

*838] *CROMPTON, J.—The present rule has been obtained to compel a party to answer certain questions arising in the case which tend to a forfeiture of his lease. In the exercise of the power given by The Common Law Procedure Act, 1854, sect. 51, to order interrogatories, I do not hold myself bound by the exact practice in Courts of equity. For a class of cases has been mentioned in which those Courts would not allow a bill of discovery where we should allow interrogatories; and I am not clear that in this mode of discovery we are bound by the rules of procedure in those Courts, though it ought to be a guide to us. I have no doubt that the exemption from a bill of discovery in cases where the discovery would lead to a forfeiture, was adopted in those Courts

from the Courts of law. It has been long recognised in our Courts, as a principle of the law of evidence in the examination of witnesses, that a witness cannot be compelled to answer a question where the answer might establish a forfeiture of his estate. *Dumpor's Case*, 4 Co. 119 b, 1 Smith Lead. Ca. 28, 5th ed., which we still consult for the law as to enforcing conditions strictly, shows the dislike which the common law had to encouraging forfeitures; and it may be that the rule with regard to discovery was thence adopted in Chancery. It is said that the distinction laid down in Courts of equity between disallowing a discovery in the case of a forfeiture and allowing it in the case of a conditional limitation is an idle one. Perhaps if we were considering the matter for the first time we should not hold that distinction. But the case of a conditional limitation, where if A. B. does an act a new limitation arises, is not considered a forfeiture, but a going over of the estate according to the will of the donor. Here the estate does not go *over on non-performance of the covenant: the breach of it may be waived. [*839 The finer, however, the distinction is, the more strongly it proves the existence of the rule as to forfeiture.

In the present case the forfeiture is of the kind on which nearly all the cases in equity have arisen; and we ought to be guided by the rule in the Courts of equity. We have also the opinion of two learned Judges, in *May v. Hawkins*, 11 Exch. 210, 213, that such interrogatories as these ought not to be allowed, though the opinion of Martin, B., perhaps went farther than we should go. Still, as far as decision goes, it remains an open question.

I think that a considerable difficulty may arise at *Nisi Prius* since parties are admitted to give evidence in their own causes; and I doubt whether, if a defendant came forward as a witness to explain or negative some matter alleged as a forfeiture, he would not have waived his privilege, and be compelled, on cross-examination, to answer a question whether he had not done some other act which would lead to a forfeiture of his lease. However that may be, we should do wrong if we overruled the old established distinction.

MELLOR, J.—The distinction pointed out by the Lord Chief Justice and my brother Crompton shows that we are not fettered by the rules of practice in the Courts of equity, for there are cases in which they refuse to grant a bill of discovery and we grant interrogatories; still, when a power is conferred on the Courts of law which heretofore has been exercised only in Courts of equity, we ought not to establish a different mode of procedure where both Courts have a common action. But it would be going very far if we were to hold that *it was left to the absolute discretion of the Judge or of the Court to [*840 decide without reference to the practice in the Court of Chancery, which, I think, was intended to be a guide to us. At first I was struck with the subtlety of the distinction between forfeiture in the sense in which we use the term on this occasion and conditional limitation; but that distinction, though nice, establishes the existence of the rule. There are also two cases in the Court of Chancery which cannot be distinguished from the present, and the dicta of the two learned Judges in *May v. Hawkins*. Therefore, we ought not to allow these interrogatories to go.

Rule discharged.

WILLIAM STIRLING the Younger v. MAITLAND and BOYD.
Nov. 15.

Implied engagement.—Covenant.—Displacement.—Insurance Company.

1. If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative.

2. An insurance Company covenanted with C. D. for valuable consideration to appoint him their agent in S., together with A. B., and that if A. B. should be displaced from the agency they would pay C. D. a certain sum; the Company having transferred their business to another Company, and wound up their affairs and dissolved themselves: Held that this was a displacement of A. B. within the meaning of the covenant.

THE declaration alleged that by indenture, bearing date the 7th December, 1852, made between the defendants and others, trustees of The United Kingdom Life Assurance Company of the first part, Alexander Brodie Seton of the second part, and the plaintiff of the *841] *third part: after reciting that A. B. Seton and A. B. Seton the younger were indebted to the Company in 2000*l.*, lent on the security of the deposit of certain policies of insurance on their lives, and also on the joint and several promissory note of themselves the plaintiff and one James Dickson; and also that A. B. Seton, as agent of the Company at Glasgow, was indebted to them in 1449*l.* 10*s.* 9*d.* in addition to the 2000*l.*, the Company, in consideration of the payment to them by the plaintiff of 1449*l.* 10*s.* 9*d.* and 2000*l.*, appointed him their agent at Glasgow jointly with A. B. Seton, and assigned to him the policies of assurance and the promissory note for 2000*l.* “And the said [trustees] for themselves, their heirs, executors and administrators, do hereby covenant and agree with the said William Stirling the younger, his executors, administrators and assigns, that in case the said Company shall at any time hereafter displace the said Alexander Brodie Seton the elder from his appointment of agent of the said Company at Glasgow, then the said Company shall and will forthwith thereafter repay unto the said William Stirling, his executors, administrators or assigns, the said sum of 1449*l.* 10*s.* 9*d.*, or so much thereof as shall not have been previously repaid to the said William Stirling, or otherwise recovered or received by him. And it is hereby further declared and agreed that, in the event of the said joint agency of the said Company at Glasgow being determined by the displacement of the said Alexander Brodie Seton the elder, as aforesaid, the said Company reserve to themselves the right of appointing the said William Stirling as their agent at Glasgow or discontinuing his services; and in the event of their *842] appointing him as their agent the said Company reserve *to themselves the right of compensating his services as such agent in such manner as they may think proper. And the said Alexander Brodie Seton the elder, for himself, his heirs, executors and administrators, doth hereby covenant and agree with the said [trustees], their executors, administrators and assigns, and as a separate covenant with the said William Stirling, his executors, administrators, and assigns, that he the said Alexander Brodie Seton the elder shall not nor will, at any time before the repayment by him to the said William Stirling of the said sums of 2000*l.* and 1449*l.* 10*s.* 9*d.*, undertake the agency, or

directly or indirectly promote the interest of any Life assurance Company other than the said United Kingdom Life Assurance Company, without the previous consent in writing of the said directors for the time being of the said United Kingdom Life Assurance Company and of the said William Stirling." Breach: That, although the Company displaced A. B. Seton the elder from his appointment as their agent at Glasgow, they had not repaid the plaintiff the sum of 1449*l.* 10*s.* 9*d.*

Plea: That the Company did not displace A. B. Seton the elder from his appointment as their agent at Glasgow.

Issue.

On the trial, before Cockburn, C. J., at Guildhall, at the Sittings after Trinity Term, 1863, a verdict was entered for the plaintiff subject to the following special case.

The United Kingdom Life Assurance Company were established under a deed executed in 1834 and stat. 4 W. 4, c. 35, and were registered, in 1844, under stat. 7 & 8 Vict. c. 110.

In 1842 the Company appointed A. B. Seton to be *their [*843 sole agent at Glasgow. His business was to procure persons to effect policies with the Company, and otherwise to bring business to the office. By way of remuneration he received 10*l.* per cent. upon the first premium and 5*l.* per cent. upon the succeeding premiums in respect of all policies effected with the Company through his introduction, and 5*l.* per cent. on all premiums which, by the direction of the Company, he might collect for them, and also an annual allowance of 130*l.* for office rent; in addition to which the Company paid the rates and taxes and other incidental expenses connected with the office. In 1847 the Company made him a further allowance of 250*l.* per annum for clerks, &c.

In the year 1848 the Company advanced on loan to him the sum of 2000*l.* on the security of the joint and several promissory note of himself, his son A. B. Seton, jun., the plaintiff, and James Dickson, and upon the deposit of policies of insurance on the life of A. B. Seton for 2000*l.*, and of policies of insurance on the life of A. B. Seton the younger, for the like amount.

In the month of December, 1852, A. B. Seton had become indebted to the Company in the further sum of 1449*l.* 10*s.* 9*d.* in respect of premiums and other moneys received by him on account of the Company and not remitted by him, and for this further debt the Company held no security whatever.

The Company pressing for payment of these two several amounts, and A. B. Seton not being himself able to discharge them, an arrangement was made that the plaintiff should pay off, not only the sum of 2000*l.* for which he was surety, but also the further sum of 1449*l.* 10*s.* 9*d.*, upon certain terms and conditions; and in pursuance of such arrangement the plaintiff, on or about the 7th December, 1852, paid to the Company the *two sums of 2000*l.* and 1449*l.* 10*s.* 9*d.* respectively; the Company appointed the plaintiff their agent at Glas- [*844
gow jointly with A. B. Seton, and the deed of covenant sued on was entered into.

After the execution of the deed and the appointment by the Company of the plaintiff as their agent at Glasgow jointly with A. B. Seton, the business of the agency was carried on by A. B. Seton in the name of

Seton and Stirling, but in the same manner as it had previously been, and the same remuneration and allowances continued to be paid by the Company as were paid whilst A. B. Seton was their sole agent. The plaintiff himself took no active part in the agency, although he occasionally called at the office in Glasgow where the same was carried on, and conversed with A. B. Seton upon the business of the Company.

On the 29th July, 1862, certain heads of agreement were entered into between The United Kingdom Life Assurance Company and The North British and Mercantile Insurance Company, subject to the sanction of the shareholders of the former Company, for the sale and transfer of the business, good-will and property of The United Kingdom Life Assurance Company to The North British and Mercantile Insurance Company. At two extraordinary general meetings of the shareholders of The United Kingdom Life Assurance Company, held respectively on the 10th August and the 3d September, 1862, the heads of agreement were confirmed, and the directors were authorized to execute them, and resolutions were passed for the winding up and dissolution of the Company. This agreement was then duly executed by both parties.

*845] The North British and Mercantile Insurance *Company was a fire and life office in Scotland, having its chief office in Edinburgh, but with a branch office at Glasgow.

The first intimation A. B. Seton had of the proposed transfer of the business of The United Kingdom Life Assurance Company was the following letter sent to him by Patrick McIntyre, the secretary of the Company, and which was written by order of its directors.

“ United Kingdom Life Assurance Company,
“ No. 8, Waterloo Place, Pall Mall,
“ London, 15th July, 1862.

“ The Board of directors hereby give notice that the yearly general meeting of the proprietors will be held at the office of the Company, No. 8, Waterloo Place, London, on Thursday, the 31st July instant, at half-past two o'clock precisely in the afternoon.

“ And the Board of directors hereby further give notice that an extraordinary general meeting of the proprietors will be held at the said office of the Company on the said 31st day of July, at three o'clock in the afternoon precisely, for the purpose of considering the propriety of transferring the business and liabilities of the Company to, or of amalgamating the Company with, any other Company or Companies carrying on the like business on such terms and conditions as may be agreed, or as may have been already provisionally agreed, and for authorizing the Board of directors to carry into effect any such agreement, and to do all acts proper and necessary for that purpose.

“ By order of the Board,
“ PATRICK MCINTYRE, Secretary.”

On the 5th August, 1862, Messrs. Setons and Stirling received from
*846] the defendant Boyd, who was the *resident director of The United Kingdom Life Assurance Company, the following letter :—

“ No. 8, Waterloo Place, Pall Mall, S. W.,
“ 5th August, 1862.

“ Dear Sirs,
“ As undoubtedly you will be asked in reference to the proposed

amalgamation of this Company with The North British and Mercantile Insurance Company, for your guidance to reply to any queries, I may inform you the reason of the step to be taken is in consequence of the result of the septennial investigation of the Company's affairs having shown that a bonus could not properly be declared on this occasion. The directors were advised that it was desirable, with reference to the interests of both the policy-holders and shareholders, that the business and liabilities of the Company should at once be transferred to another office; a provisional agreement was therefore entered into with The North British and Mercantile Insurance Company, which has already received the approval of a general meeting of the shareholders of the Company specially summoned to consider the same. This agreement (if adopted) will secure to the policy-holders of the participating class a reversionary bonus for the last seven years, amounting to 1*l.* per cent. per annum on the sum assured. For the next seven years a bonus to the extent of two-thirds of the profits on this Company's policies, and thereafter a bonus to the extent of two-thirds of the profits of the life business of The North British and Mercantile Insurance Company. The directors have no hesitation in saying that they deem this arrangement one to the advantage of the policy-holders.

"I am, &c.,

"E. LENNOX BOYD,

"Resident Director.

*"P. S.—I enclose you a prospectus of The North British and Mercantile Insurance, showing the terms on which they effect [*847 new business. "E. L. B."

On the 8th September, 1862, Messrs. Setons and Stirling received from the defendant Boyd the following letter:—

"No. 8, Waterloo Place, Pall Mall,

"London, S. W. September 8th, 1862.

"Dear Sirs,

"In conformity with the provisions of the Company's deed of settlement the usual septennial investigation of the Company's affairs took place in the present year; the result of that investigation satisfied the directors that the interests of the Company's shareholders and policy-holders would be best consulted by a transfer of the business and liabilities of this office to another Company.

"A provisional agreement was accordingly entered into with The North British and Mercantile Insurance Company, which has been unanimously approved and finally confirmed by three extraordinary general meetings of the shareholders of this Company specially convened for its consideration.

"I have the pleasure to inform you that this agreement secures to the policy-holders of the participatory class a reversionary bonus for the last seven years, amounting to 1*l.* per cent. per annum on the sum assured; for the next seven years a bonus to the extent of two-thirds of the profits on this Company's policies (without any deduction whatever for working expenses), and thereafter a bonus to the extent of two-thirds of the profits on the whole life business of the North British and Mercantile Insurance Company.

*"A circular is in preparation, and will very shortly be issued [*848 to all our policy-holders, apprising them of this arrangement,

and the actual transfer of the business will take place on the 1st day of October next.

"Looking at the high position of The North British and Mercantile Insurance Company, its very large and wealthy proprietary, and the superior advantages it offers to the public and secures to the policy-holders of this Company, the Board of directors feel that the arrangement they have entered into cannot but give general satisfaction.

"In returning you the cordial thanks of the Board of directors of this Company for your influential introduction and valuable services, I am desired to express their earnest hope that you will continue to extend such influence and service to The North British and Mercantile Insurance Company, who will carry on business at this office as a branch, and who will, I feel assured, give prompt and particular attention to all matters affecting the interest of the agents and the constituents.

"I have the pleasure to enclose you a prospectus of The North British and Mercantile Insurance Company, showing the terms upon which they grant new insurances, and at the same time to inform you that Mr. David Smith, their general manager, will communicate with you in a few days.

"I am, &c.,

"E. L. BOYD,

'Resident Director.'

'Enclosure.'

The Court were to be at liberty to draw such inferences from the facts above stated as a jury might draw.

The plaintiff contended that The United Kingdom Life Assurance *849] Company having voluntarily transferred their *business, and ceased to employ A. B. Seton as their agent, he was displaced by the Company from his appointment as agent within the meaning of the covenant, and that the Company thereupon became liable to pay to the plaintiff the sum of 1449*l.* 10*s.* 9*d.*

The question for the opinion of the Court was, Whether The United Kingdom Life Assurance Company had displaced A. B. Seton from the appointment of agent of the Company at Glasgow within the meaning of the covenant in the declaration mentioned.

Montague Smith (*Murray* with him), for the plaintiff.—The defendants covenanted for a valuable consideration to pay the plaintiff a certain sum if they should displace his co-agent from his appointment as their agent; and here they have voluntarily done an act the consequence of which is to displace him; namely, the transferring their business to another Company. If a party renders the performance of his contract impossible, his liability on it remains. The meaning of the term "displace" depends on circumstances. Pulling a chair from under a man is "displacing" him; and the captain of a ship is "displaced" if the owner sells the ship. [CROMPTON, J.—If the displacement was the consequence of the involuntary act of the party—as, for instance, a bankruptcy—it might be different.] Yes. Or, in case of private partnership, where one of the partners dies. [CROMPTON, J.—There is a rather curious case on this subject, *Charnley v. Winstanley*, 5 East 266.] In *Tasker v. Shepherd*, 6 H. & N. 575, where stone merchants in partnership appointed the plaintiff their sole London agent for the period of four *850] years and a half, who *accepted the employment for a valuable consideration, the partnership having been dissolved by the death

of one of the partners, it was held by Channell and Wilde, BB., dubitante Martin B., that the contract was at an end; but they considered that the parties must be supposed to have presumed that the partnership would last for that period. In *M'Intyre v. Belcher*, 14 C. B. N. S. 654 (E. C. L. R. vol. 108), where an agreement for the sale of the good-will of a medical practice stipulated for value, inter alia, that the vendors should not, within ten years from the date of the agreement, practise at the locus in quo, or within ten miles; the purchaser to pay the vendors, at the end of each of the first four years, one-fourth of the gross earnings, provided they did not fall below 300*l.*; it was held there was an implied contract by the purchaser to carry on the practice.

Bovill (*Coleridge* and *Horace Lloyd* with him), for the defendants.—Here was no displacement of Seton within the meaning of the covenant. The deed sued on was prepared with reference to the Company as constituted, and therefore became of no force after the winding up and dissolution of the Company. Not only does the deed contain no clause for the continuance of the office, but the language of the covenant shows that the contingency of the joint agency being put an end to was contemplated.

The cases cited by the other side are inapplicable, for in both there was a positive agreement which was to be in force for a definite period.

Montague Smith, in reply.—If the manager of a theatre *were [*851 to covenant with an actor that if he displaced him he would give him a sum of money, the giving up the theatre would be a displacement. It is even doubtful whether the letter of the defendant Boyd, as resident director, of the 8th September, 1862, is not in itself a displacement of the co-agent. Perhaps the defendants are entitled to relief in equity.

COCKBURN, C. J.—Our judgment is for the plaintiff. When we look at the terms of the deed and its recitals, the nature of the engagement, and the intention of the parties to this covenant, the matter appears very plain. Seton, being the agent of this Insurance Company, becomes indebted to them. The plaintiff is invited to pay off the debt, but then the question arises, how is his repayment from Seton to be secured? The deed recites all the facts. First, it is agreed that the plaintiff shall be appointed co-agent of the Company with Seton, the design of which obviously was to enable him to control the money received by Seton, and then, as the whole object would be defeated by the displacement of Seton, the Company undertake not to displace him. In time the Company found their business not very profitable, and thereupon an arrangement was made with another Company that the business and interest of the Company, of which the defendants are trustees, was to be transferred to it. The moment that is done there is an end to the business of the defendants' Company; and, if no further insurances were effected by that Company the agency necessarily falls to the ground. The question is, does that come within this covenant? I think it does. Practically the point comes to this. The defendants say, we being an insurance Company, *and Seton being our agent, we, to secure [*852 you, the plaintiff, payment of the 1449*l.* 10*s.* 9*d.* which you have paid to us as being his debt, covenant with you that we will continue him in that employment, and I take it, as *Mr. Bovill* puts, that this means so long as we are a Company. I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied

engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative. I agree that if the Company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue. The transfer of business and dissolution of the Company was certainly the act of the Company itself, so that they have by their act put an end to the state of things under which alone this covenant would operate.

The effect of our decision may be to do what, in an equitable point of view, is unjust between the parties; for the intention of the covenant was that, by the continuance of Seton in his position as agent, the plaintiff should be recouped his 1449*l.* 10*s.* 9*d.*: but that is not the question of which we have to dispose.

CROMPTON, J.—The covenant is not that the Company shall not turn away or displace Seton, but that if they do they will pay this sum to the plaintiff. Looking fairly at the meaning of the covenant, I think that *853] *when the Company did an act by which Seton was necessarily displaced, it is sufficient; there need not be a direct displacement of him. It is like the case of *Charnley v. Winstanley*, 5 East 266, to which I have already referred, where the marriage of a woman, the legal consequence of which was to prevent her performing a certain covenant, was held an indirect breach of the covenant. Here the best construction I can put on the term “displacement” is “putting out of his place;” and when, by the voluntary act of the Company, the party is either put out of the place directly, or the place is taken from him, his possession of the place equally ceases. I think when the Company destroy the place he is displaced to all intents and purposes, and I do not know that this can be even called an “indirect” displacement, for displacement seems the “direct” consequence of their act. The same principle would apply if the contract had been made with an ordinary firm instead of a Company.

MELLOR and SHEE, JJ., concurring,

Judgment for the plaintiff.

*854] *BUCKLE, Appellant, WRIGHTSON, Respondent.
Nov. 19.

Towns Police Clauses Act, 1847, 10 & 11 Vict. c. 89.—*Hackney carriage.—License.—Post-horse duty.*

A person using a hackney carriage plying for hire in a town is not exempted from the obligation of taking out a license under *The Town Police Clauses Act*, 1847, 10 & 11 Vict. c. 89, on the ground that he has already paid post-horse duty to the Commissioners of Inland Revenue.

CASE stated under stat. 20 & 21 Vict. c. 43.

At a Petty Sessions held at Darlington, in the county of Durham, on the 14th March, 1864, an information was laid against the respondent, for that, on the 9th January, 1864, at the township of Darlington, the respondent then being the proprietor of a certain carriage, did unlawfully permit the same to be used as a hackney-carriage plying for hire within five miles from the General Post Office of Darlington (the same

being the prescribed distance) without having obtained a license from the Local Board of Health (the Commissioners under The Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89), for the distance of the township of Darlington aforesaid for such carriage, contrary to The Darlington Local Board Act, 1854, and contrary to the form of the statute, &c.

Upon the hearing of the information The Darlington Local Board Act, 1854, was put in on the part of the appellant, and was to be taken as part of this case. That Act incorporates The Town Police Clauses Act, 1847, with respect to hackney-carriages; and it was under the 45th section of the Act so incorporated that the information was laid. The evidence given on the part of the appellant was as follows:—

*Marmaduke Buckle (the appellant) stated:—“I am an officer of the Darlington Local Board of Health. On the 9th January [*855 last I saw Francis Thompson, driver of Mr. Wrightson's cab, on the stand at the Bank Top Station, with a cab. I observed him there a short time before the train arrived. I saw him leaving the cab-stand. Mr. Pritchett got into the cab, and he was driven off towards the town. The station is within a mile of the General Post Office in Darlington.”

In answer to the charge, the respondent said:—“I don't deny running the cab. I have a license which enables me to run in any part of the kingdom, and which I get from a higher power than the Local Board of Health. I get it from the Inland Revenue Commissioners, and I don't require a license from the Board of Health.” The following is a copy of the license held by the respondent:—

“Durham Collection,
“No. 238. “Bishop Auckland District.

“Receipt for Post Horse License Duty from the day of the date hereof to the 5th day of January, 1863.

“Received of John Wrightson, who has made entry of premises at Northgate, Darlington, in the parish of Darlington, in the county of Durham, the sum of 7*l.* 10*s.*, being one-fourth part of the annual duty for a license to keep at one time to be let for hire eight horses and six carriages.

“Dated this 6th day of October, 1862.

W. KEENAN, Collector.

“Examined this 8th day of December, 1862.

“JOHN OSTLE, Supervisor.”

It was contended on the part of the appellant, that this license not being a stage-coach license, and the cab *in question not being [*856 a stage coach and so within the proviso to the 38th section of The Town Police Clauses Act, 1847, did not enable the respondent to permit his cabs to ply for hire within five miles of the General Post Office in Darlington without the license of the Local Board of Health, and that the respondent's license was merely a “Post-Horse License” for the purpose of the revenue.

The justices, however, being of opinion that the license of the Commissioners of Inland Revenue did enable the respondent to ply his cabs for hire within those limits without having also the license of the Local Board of Health, gave their determination against the appellant.

If the Court should be of opinion that their decision was wrong, and that they ought to have convicted the respondent, the Court was soli-

cited to remit the case to them with the opinion of the Court thereon, or to make such other order as to the Court might seem fit.

The following are the sections of the Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, bearing on this case.

Sect. 37. "The Commissioners may from time to time license to ply for hire within the prescribed distance, or if no distance is prescribed, within five miles from the General Post Office of the city, town, or place to which the special Act refers (which in that case shall be deemed the prescribed distance), such number of hackney-coaches or carriages of any kind or description adapted to the carriage of persons as they think fit."

Sect. 38. "Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance, and every carriage standing upon any street within *857] the *prescribed distance, having thereon any numbered plate required by this or the special Act to be fixed upon a hackney-carriage, or having thereon any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney-carriage within the meaning of this Act; and in all proceedings at law or otherwise the term (hackney-carriage) shall be sufficient to describe any such carriage: Provided always, that no stage-coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed for that purpose, and having thereon the proper numbered plates required by law to be placed on such stage-coaches, shall be deemed to be a hackney-carriage within the meaning of this Act."

Sect. 39. A fee to be paid for every such license.

Sect. 41. "In every such license shall be specified the name and surname and place of abode of every person who is a proprietor or part proprietor of the hackney-carriage in respect of which such license is granted, or who is concerned, either solely or in partnership with any other person, in the keeping, employing, or letting to hire of any such carriage, and also the number of such license, which shall correspond with the number to be painted or marked on the plates to be fixed on such carriage, together with such other particulars as the Commissioners think fit."

Sect. 42. Licenses to be registered.

Sect. 45. "If the proprietor or part proprietor of any carriage, or any person so concerned as aforesaid, permits the same to be used as a hackney-carriage plying for hire within the prescribed distance without having obtained a license as aforesaid for such carriage, or during the *858] time that such license is suspended as *hereinafter provided, or if any person be found driving, standing, or plying for hire with any carriage within the prescribed distance, for which such license as aforesaid has not been previously obtained, or without having the number of such carriage corresponding with the number of the license openly displayed on such carriage, every such person so offending shall for every such offence be liable to a penalty not exceeding forty shillings."

Sawyer, for the appellant.—The license of the Commissioners of Inland Revenue was required solely with a view to the revenue, and is therefore inapplicable here. It is essential that the proprietors of hackney-carriages plying for hire in towns, large ones especially, should be under police regulation.

No counsel appeared for the respondent.

The COURT (consisting of COCKBURN, C. J., CROMPTON and MELLOR, JJ.) acceded to this view, saying that the regulation of hackney-carriages was clearly a matter of police, and unless there was something to show an intention to exclude their authority in such cases the holding so would be productive of the most mischievous consequences.

Judgment for the appellant.

***MOODY v. CORBETT and Others, and The LONDON, BRIGHTON and SOUTH COAST Railway Company. [*859
[May 15, 1865.]**

Railway Company.—Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 127.—7 & 8 Vict. c. xcii., ss. 216, 217.—26 & 27 Vict. c. cxcii., s. 28.—Superfluous lands.—Lands adjoining thereto.

A railway Act, 7 & 8 Vict. c. xcii., ss. 216, 217, containing precisely similar provisions to those in The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 127, enacted that "for the purpose of making provision respecting the sale of lands acquired by the Company under the provisions of this Act, but which shall not be required for the purposes thereof," the Company should sell such superfluous lands within ten years after the passing of the Act; and if the Company did not sell such superfluous lands within the period aforesaid, they were to "vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same." A subsequent Act obtained by the same Company, 26 & 27 Vict. c. cxcii. s. 28, enacted "The respective periods by the several Acts relating to the Company limited for the sale of the superfluous lands are hereby respectively extended for five years from the passing of this Act, and those several Acts shall be read and construed as if that period had been fixed by each of those Acts respectively." The land of an owner adjoining to superfluous lands continued by a line nearly parallel with the railway until it met the land of another owner also adjoining such lands which slanted off from the railway: Held,

1. That these owners were not entitled to have the superfluous lands divided between them as tenants in common, nor apportioned between them according to the depth of their land or the limit of the frontage, but that the proper course was to draw a straight line from the point where the boundaries of the two adjoining owners met to the nearest point of the land actually used by the Company for their works, and allot the land on each side of that line to the respective owners.

2. That the words "lands acquired by the Company under the provisions of this Act, but which shall not be required for the purposes thereof," extended to lands the reversion to or other partial interest in which had been acquired by the Company, and were not confined to lands acquired with the right to immediate possession, so that the Company might enter upon and apply them to the purposes of the railway.

3. That stat. 26 & 27 Vict. c. cxcii., had not the effect of defeating an interest previously vested under the provisions in the former Act.

EJECTMENT to recover a piece of land containing four acres and thirty-four perches or thereabouts, and situate near to a bridge over the London, Brighton and South Coast Railway, at Croydon, in the county of Surrey, called Pitlake Bridge, bounded on the west by the high road leading from Croydon to Mitcham, on the north by land of the plaintiff, on the east by land belonging to Messrs. Thomas and James Turner, and *on the south by the London, Brighton and South Coast Railway, with the messuages or tenements and buildings standing thereon and in the respective occupations of the defendants Corbett, Walker, Haworth and Wright. [*860

On the trial, before Williams, J., at the Croydon Summer Assizes,

1861,(a) a verdict was entered for the plaintiff, with leave to the defendants to move to enter a nonsuit if the Court should think that there was no evidence to go to the jury in support of the plaintiff's case, the Court, in the event of such rule being ultimately discharged, to say for what portion of the land, if any, the verdict should stand.

In the following Michaelmas Term, a rule Nisi was granted to enter a verdict for the defendants, or a nonsuit, upon the following grounds. First, that there was no evidence to go to the jury in support of the plaintiff's case. Second, that, as to the part of the property occupied by one West, there was no evidence that the land was ever acquired by or belonged to The Croydon and Epsom Company, and that it ever became subject to the provisions of that Company's Act, 7 & 8 Vict. c. xcii., and that no notice by that Company was proved to take any land except the part acquired and used for the line of railway itself, and that the evidence only showed that The London, Brighton and South Coast Company were the owners of the land after ten years had expired from the passing of that Act. Third, the like points upon the evidence given as to the parts of the property formerly occupied by one Morley. *861] Fourth, that if the *lands were ever acquired by the Croydon and Epsom Company, there was no evidence that they were not required for the purposes of the Act of that Company at the time the ten years expired in 1854. Fifth, that if the lands were ever required by the Croydon and Epsom Company there was no evidence that they were not so required under the 223d section of that Company's Act, and that the 216th section in that case would not apply. Sixth, that, if the lands were required by the Croydon and Epsom Company, the forfeiture clause, sect. 217, became inoperative by the dissolution of that Company. Seventh, that the property was not shown to have been the property of the London, Brighton and South Coast Company, and subject to the provisions of the Act of the Croydon and Epsom Company. Eighth, that the plaintiff did not prove that he was the owner of land adjoining to the lands in question within the meaning of the 217th section of that Act. Ninth, that the plaintiff did not show the proportion or extent of his own land and of other lands adjoining, nor show any definite land to which he was entitled.

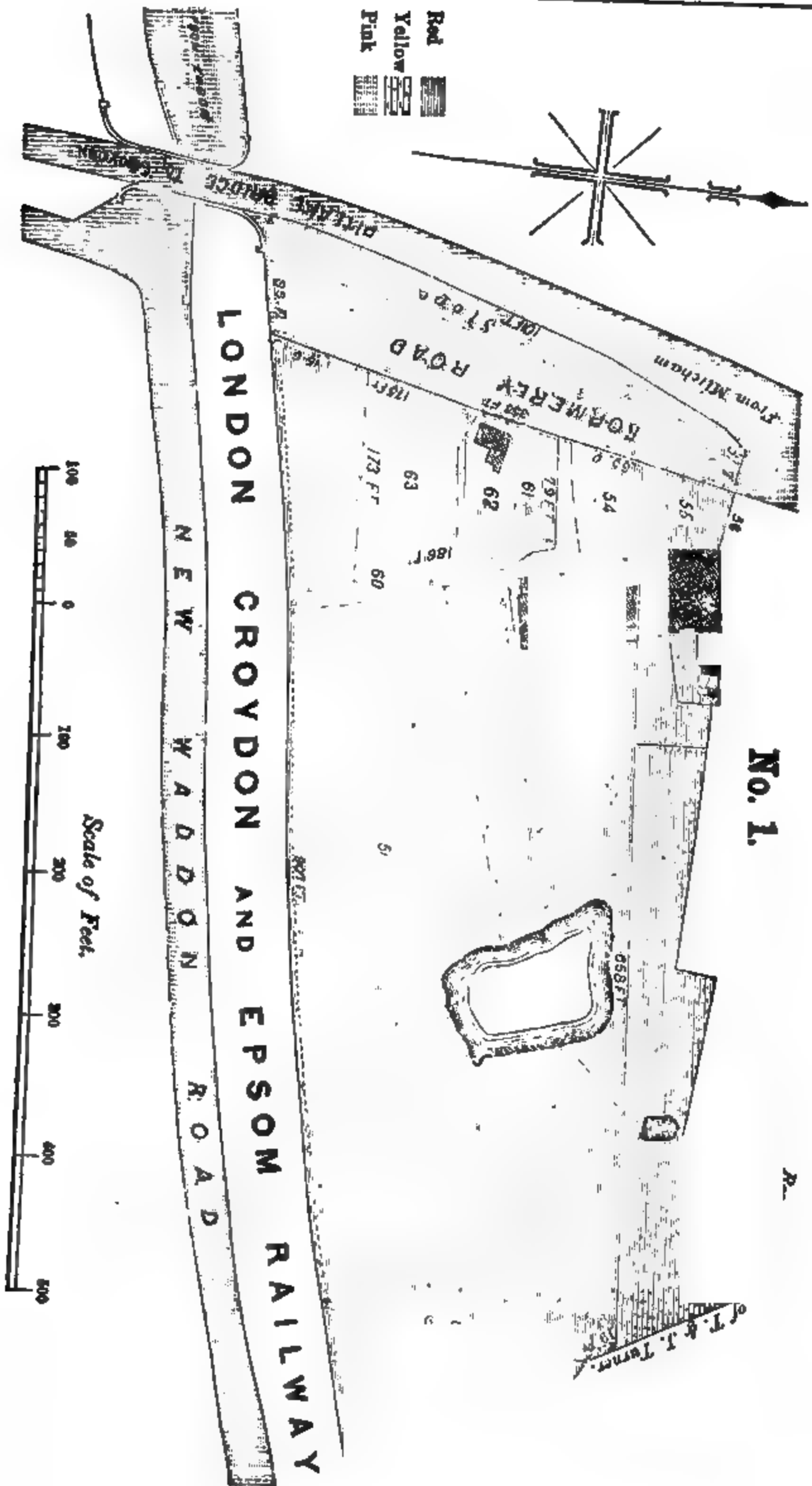
Afterwards it was agreed between the parties that the verdict so entered should stand, subject to the following special case.

The plaintiff is the surviving trustee of a marriage settlement, made on the 5th June, 1844, in contemplation of the marriage of Mrs. Susannah Hawkins with the Rev. Thomas Ainsworth, which subsequently took place; and by the settlement the legal estate in the lands which were coloured green in a plan marked No. 1 (which was made to *862] scale, and which *accompanied and formed part of the case),(a) and of which Mrs. Hawkins was the owner in fee simple, was duly conveyed in fee to the plaintiff and two other trustees, since deceased, upon the trusts therein mentioned.

The defendants, The London, Brighton and South Coast Railway Company, appeared and defended for the whole, as did also the other defendants, Corbett, Walker, Haworth and Wright, who were severally

(a) This was a second trial. See *Moody v. The London, Brighton, and South Coast Railway Company*, 1 B. & S. 290 (E. C. L. R. vol. 101).

(b) See this plan annexed.



at the time of the bringing of this action occupiers of the lands and the buildings sought to be recovered, the lands being coloured pink on the plan, and the buildings thereon being shaded, and they severally derived their title through the railway Company.

The plaintiff, as owner of the adjoining lands coloured green on the plan No. 1, sought, under the provisions contained in sects. 216 and 217 of stat. 7 & 8 Vict. c. xcii., passed on the 29th July, 1844, entitled "An Act for making a railway from the London and Croydon Railway at Croydon to Epsom," to recover possession of the lands and buildings mentioned in the writ of ejectment, as being superfluous lands adjoining the plaintiff's unsold within the prescribed period of ten years after the passing of the Act, and therefore forfeited to the plaintiff as such adjoining owner.

By stat. 5 W. 4, c. x., The London and Croydon Railway Company was incorporated for the purpose of making a railway from Croydon to join the London and Greenwich Railway near London.

By stat. 7 & 8 Vict. c. xcii., the Croydon and Epsom Railway Company *863] was incorporated for the purpose of *making a railway from the London and Croydon Railway at Croydon to Epsom.

Sect. 131 of the latter Act enacted: "That, subject to the provisions of the Act, it should be lawful for the Company to agree with the owners of the lands which they were thereby authorized to enter into and take for the purposes of the railway, for the absolute purchase, for a consideration in money, of any such lands, or such parts thereof as they should think proper, and of all subsisting leases therein, and of all rent-charges, annuities, mortgages, or encumbrances affecting any such lands, and all commonable or other rights to which such lands might be subject, and all other estates or interests in such lands, of what kind soever."

Sect. 216, "For the purpose of making provision respecting the sale of lands acquired by the Company under the provisions of this Act, but which shall not be required for the purposes thereof," enacted: "That the Company shall sell all such superfluous lands in such manner as they may deem most advantageous, and convey the same to the purchasers thereof by deed under the common seal of the Company, and a receipt under such common seal shall be a sufficient discharge to the purchaser of any such lands for the purchase-money in such receipt expressed to be received, and such sales and conveyances shall take place within ten years after the passing of this Act."

Sect. 217 enacted: "That if the Company do not sell such superfluous lands within the period aforesaid, then such lands remaining unsold at the expiration of such period shall thereupon vest in and *864] become the property of the owners of the lands adjoining thereto, *in proportion to the extent of their lands respectively adjoining the same."

Sect. 218. "Provided always, and be it enacted, That before the Company dispose of any such superfluous lands they shall offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed; or if such person refuse to purchase the same, or cannot be found, then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering

into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption, such offer shall be made to such persons in succession one after another in such order as the Company shall think fit."

Sect. 223 enacted: "That for any of the following purposes it shall be lawful for the Company, in addition to the lands authorized to be compulsorily taken by them as aforesaid, to contract with any party willing to sell the same for the purchase of any land adjoining or near to the railway, not exceeding in the whole ten acres; (that is to say),

"For the purpose of making and providing additional stations, yards, wharfs, &c.:

"For the purpose of making convenient roads or ways to the railway, or for any other purpose which may be requisite or convenient for the formation or use of the railway:

"And it shall be lawful for all parties who, under the provisions hereinbefore contained, would be enabled to sell and convey lands required for the railway to sell *and convey lands for any such [*865 additional purposes as aforesaid."

By sect. 224 the Company were empowered to sell the additional lands which they should have so acquired to such persons as they might think fit, and to purchase other lands for the like purposes.

Sect. 227 enacted: "That, subject to the provisions and restrictions in the Act contained, it should be lawful for the Company to make and maintain the railway and works in the line and upon the lands delineated and described on the plan and in the books of reference thereafter mentioned, and in the schedule thereto, and for that purpose to enter upon, take, and use such of the lands so delineated and described as should be necessary for making and constructing the railway and works."

Sect. 228 recited, that plans and sections of the railway showing the line and levels thereof, and also a book of reference containing the names of the owners, lessees, and occupiers, or reputed owners, lessees, and occupiers, of the lands through which the same was intended to pass, had been deposited with the clerk of the peace of the county of Surrey.

Sect. 230 enacted, that true copies of such plans and book of reference or of any correction thereof, or extracts therefrom, certified by such clerk of the peace, should be received in all Courts of justice or elsewhere as evidence of the contents thereof.

Sect. 231 enacted, that the Company in making the railway should have power to deviate from the line delineated on the plans so deposited; provided that no such deviation should extend to a greater distance than *the limits of deviation delineated on the plans, nor to a greater [*866 extent in passing through a town than ten yards, or elsewhere to a greater extent than one hundred yards, from the line; nor should such deviation extend into the lands or property of any person whose name is not mentioned in the book of reference, without the previous consent in writing of such person, unless the name of such person should have been omitted by mistake, and the fact that such omission proceeded from mistake should have been certified in manner thereinbefore provided for in cases of unintentional errors in the book of reference.

Sect. 234 enacted, that the Company should not take or injure any property of the following kinds, except such as should be specified in

the schedule to this Act, without the consent in writing of the owners and occupiers thereof, unless the omission in such schedule be certified, according to the provisions thereinbefore contained, to have proceeded from mistake; (that is to say), any house or building erected on or before the 30th November, 1843, or any ground on or before that day enclosed or set apart and used as a garden, orchard, nursery ground, yard, paddock, plantation, planted walk, or avenue to a house.

Sect. 236 limited the breadth of the lands to be taken for the line of the railway and the works connected with it.

By sect. 351, the interpretation clause, "The word 'lands' shall extend to messuages, lands, tenements, and hereditaments of any tenure."

In addition to the plan, No. 1, another plan, No. 2, which accompanied the case, was also put in evidence.

*867] *The plan, No. 2, was a tracing of a portion of the plan deposited with the clerk of the peace under sects. 227 and 228, and which was also put in evidence, and the numbers mentioned therein referred to the numbers and description of the property mentioned in the book of reference, an extract from which was set out in the case.

The Nos. 51, 52, 53, 54, 60, 61, 62 and 63, on the plan, No. 2, comprised the portion coloured pink on the plan No. 1, as well as the portion of the line of railway adjoining. The Nos. 55 and 59 on the plan No. 2, comprised the parts coloured green on the plan No. 1.

The schedule referred to in sects. 227 and 234 of stat. 7 & 8 Vict. c. xcii. contained a description of the property numbered 51, 52, 53, 54, 55, 61 and 62, similar in all respects to that contained in the book of reference, with the exception of their not being numbered. Such schedule did not contain No. 63, the same being pasture land. And the schedule only contained lands of the particular description enumerated in the 234th section.

The red lines on the plan No. 2, denoted the limits of deviation mentioned in sect. 231, and the whole of the property claimed, as well as part of the plaintiff's, was within them.

By stat. 7 & 8 Vict. c. xcvi. (6th August, 1844), the powers of The London and Croydon Railway Company were extended, and by sect. 26 power was given to them to purchase the Croydon and Epsom Railway.

By stat. 9 & 10 Vict. c. cclxxxiii. (27th July, 1846), reciting these *868] acts amongst others, and that in pursuance *of stat. 7 & 8 Vict. c. xcvi. The London and Croydon Railway Company had purchased the Croydon and Epsom line, the London, Brighton and South Coast Railway was incorporated. By sects. 1 and 5 the Companies incorporated by the recited Acts were dissolved, and the powers and privileges, railways, &c., and all lands, &c., granted to them were vested in The London, Brighton and South Coast Railway Company; and by sect. 21 the regulations and restrictions in the Acts of the dissolved Companies were made binding on The London, Brighton and South Coast Railway Company.

Stat. 26 & 27 Vict. c. cxcii. s. 28: "The respective periods by the several Acts relating to the Company limited for the sale of the superfluous lands are hereby respectively extended for five years from the

passing of this Act, and those several Acts shall be read and construed as if that period had been fixed by each of those Acts respectively."

In support of the plaintiff's case the following evidence was given.

Thomas Fowler Wood proved that before and at the time of the passing of the Croydon and Epsom Railway Act he was the owner of Nos. 51, 52, 53, 54 and 60, the last number being a public footpath, shown on the plan No. 2. That the triangular piece at the east end of that plan, coloured pink and marked A.(a) was no part of his property, and he whilst such owner received the following notice.

"In pursuance of the provisions contained in" stat. 7 & 8 Vict. c. xcii., "I do hereby, on behalf of The *Croydon and Epsom Railway [*869 Company, give you notice that a certain piece of orchard land, containing by estimation 3 roods and 15 perches or thereabouts, and being parcel of a larger piece of orchard land situate in the parish of Croydon, in the county of Surrey, now or late in the occupation of Samuel Harris, distinguished in the map or plan and book of reference deposited in the office of the clerk of the peace for the county of Surrey and referred to by the said Act with the No. 51, and delineated in the plan hereunto annexed, and therein coloured red, will be wanted and required by the said Company for the purposes of the said Act, and that it is the intention of the said Company to contract for, and they are now willing to treat and agree for the purchase thereof, and of all subsisting leases, terms, estates and interests therein. And further, that you are hereby required, on or before the expiration of one calendar month next after this notice, to deliver or cause to be delivered at the office of the said Company, being, &c., a statement in writing of the particulars of the estate, share, interest or charge which you claim to be entitled to, or to be authorized to receive satisfaction and compensation for, and of the injury or damage sustained by you, and of the amount of the sum of money which you may demand or be willing to receive in satisfaction and compensation for the value of such lands and premises, and such estate, share, interest or charge, and for such injury or damage respectively. Dated the 16th January, 1845.

"To Messrs. Thomas F. Wood and Samuel Harris, and to all and every person and persons whom it may concern.

"R. J. YOUNG,

"Secretary to the said Company."

*And of part of which land, viz., Nos. 51, 52, 53 and 54, Samuel Harris was the tenant or occupier; that the adjoining property occupied by Morley, viz., Nos. 61, 62 and 63, belonged to Mr. Wright since dead. [*870

He stated further that there was a transfer and conveyance executed by him to The Croydon and Epsom Railway Company of the whole of the land, Nos. 51, 52, 53, 54 and 60; that he in 1846 received the purchase-money and left the conveyance with his solicitor, Mr. Drummond, of Croydon, and had not since seen it or had possession of the land. This deed was called for by the plaintiff pursuant to the usual notice but was not produced.

He further stated that the railway was made upon part of the property taken from him by the railway Company; that he had recently been

(a) In the course of the argument the claim of the plaintiff to this piece of land was given up.

over the property, when he found the hedges and other boundaries the same as when the lands were his, except so far as the same had been altered by the severance and alteration that was caused by making the railway over a portion of the property.

Giles Long proved that he knew the land adjoining and close to Pitlake Bridge, on the Croydon and Epsom line of railway; and stated that the land marked green represented the part on the plan No. 1 of the land he then held as yearly tenant under Mrs. Ainsworth, formerly Mrs. Susannah Hawkins, and had done so for rather more than twenty-one years; that he knew the adjoining property coloured pink, and that it was in the occupation of Harris for many years before the making of the railway, and after him it was occupied by Mr. Wright; and after Mr. Wright the defendant Corbett occupied one of two cottages (originally forming one *house) thereon, and another person occupied the *871] other cottage; there was a kitchen garden, flower garden, and fish pond belonging to the house occupied by the defendant Corbett, and about three acres and a half of meadow land, of a part of which Corbett had been in occupation about four years; that he saw the railway men, when the railway was being made upon the land, conveying ballast from the pond and its vicinity (being the part occupied by Harris, and part of the land coloured pink), to the railway, and making the railway; that the triangular piece was not held by Harris; and that there was at the west end a piece of land between the ground in question and the road-bank, which was used as a road from the Croydon parish road to his house and the property occupied by Corbett and others; that after passing Corbett's premises there was a vacant piece of ground, formerly part of the old parish road, and running down to and stopped many years ago by the railway; it had become grassed over, and the part near the railway used as a wood yard by Morley, and afterwards by West.

Thomas West proved that he rented a portion of the land coloured pink, consisting of a house with a cottage attached, with meadow and garden, and had done so for thirteen years next prior to Christmas, 1860, but not the cottage and lands Nos. 61, 62 and 63, which were occupied by Morley under an agreement, which was not produced, and that he underlet the house, meadow and garden land to the defendant Wright, who underlet to the defendant Corbett, and that he underlet the cottage attached to another person; that when he first went there the railway *872] was being made, but was not finished. *He proved, further, that during all that time he paid his rent to The London, Brighton and South Coast Railway Company.

John Morley proved that he occupied one of the cottages and the rest of Wright's property on the plan No. 1, and which adjoined Wood's property, and being Nos. 61, 62 and 63 in the plan No. 2 and a book of reference, under leases from Wright, which were then produced by him, for twenty-one years from 1836 to 1857; that he paid rent to Wright during such period until the making of the railway, and after that to H. Anscombe, on behalf of The London, Brighton and South Coast Railway Company, and continued to do so to the end of his term.

Henry Anscombe, superintendent at the London, Brighton and South Coast Railway terminus, and formerly travelling inspector of such Company, proved the receipt of rent from the last two witnesses, West and Morley, for their holdings during the last four or five years, and the

payment of it to The London, Brighton and South Coast Railway Company.

George Robinson proved that he had been a servant for ten years of The London, Brighton and South Coast Railway Company, and that he occupied the cottage formerly let to Morley, and had done so for two years; he took the cottage from one Brown, who was in the Company's employ, and that his rent for such cottage was deducted by The London, Brighton and South Coast Railway Company from his wages every fortnight. He added that the nature of his employment did not render it convenient that he should occupy that cottage more than any other.

*After the determination of Morley's lease The London, Brighton and South Coast Railway Company was duly rated for [*873 the house so occupied by Robinson, and they paid the rates.

The catalogue or particulars, with plans and conditions of sale, marked W., which accompanied and formed part of the case, were headed "London, Brighton and South Coast Railway Company, surplus estates, freehold and copyhold. Francis Fuller & Co. have received instructions from The London, Brighton and South Coast Railway Company to sell by auction at the Mart, opposite the Bank of England, on Wednesday, the 22d June, 1859, in lots, several portions of their surplus properties, comprising exceedingly valuable and highly important estates adjoining or near to the following stations on their line of railway."

The description therein of "Lot 2, near the West Croydon Station" was set out in the case. The particulars stated, "the title to this lot will commence as to part with a conveyance dated the 11th February, 1846, and as to the other part with a conveyance dated the 26th February, 1846."

The fourth condition of sale was as follows.

"IV. The vendors will within twenty-one days after the sale deliver to each purchaser an abstract of the title to the lot or lots purchased, such abstract commencing with the deed, surrender, admission, or other document stated in the particulars of each lot, and no earlier title or evidence of any earlier title shall upon any ground or pretence whatever be required, and it shall be assumed that every such deed, surrender, admission and other document well and effectually conveyed or passed the property, estate and interest *purporting to be thereby conveyed or passed, free from all encumbrances, claims and demands, [*874 and it shall be assumed without proof, question or inquiry that the vendors and the persons in whom the legal estate or the property is now vested have done and performed all acts and things necessary or proper to be done and performed, to enable or authorize them to sell, convey, surrender and assure the lot or lots to the purchaser or purchasers thereof respectively, and the purchaser or purchasers shall not make any objection or requisition on account of the vendors being accountable to the Crown under any bond for payment of duties on passengers or otherwise, or on the ground of any judgment, rule, decree or order registered against the vendors and appearing to be unsatisfied (if any such there be), or on account of any claim for compensation or other claim against the vendors with respect to any part of the property or otherwise (if any such there be), or on account of any liability of the vendors or any account whatsoever, and it shall not be necessary for the vendors to furnish any evidence of the identity of any

of the lots with the property described in the abstracted documents, and if the respective purchasers or their solicitors shall not within ten days after the delivery of the abstract state in writing to Messrs. G. Faithfull & Son, of, &c., the vendors' solicitors, some valid objection to the title not precluded by these conditions, the purchaser shall be considered as accepting the title, and all objections not delivered within that time shall be considered as waived, time being in this respect the essence of the contract."

Among the plans above referred to in the particulars was one marked X., appertaining to and descriptive of Lot 2, and headed as follows:

*875] *“London, Brighton and South Coast Railway.
“Plan of land in the parish of Croydon, to be sold by auction, June, 1859.”

The part coloured pink thereon represented the 4 a. 0 r. 34 p. to be put up to auction, and is bounded on the one side by the London, Croydon and Epsom Railway, and on the opposite side by land belonging to Mrs. Ainsworth, on another side by the high road from Croydon to Mitcham, being land not belonging to the plaintiff or the defendants, and on the remaining side by land belonging to Messrs. Thomas and James Turner. Pitlake Bridge is also marked thereon.

James Scott, for three years deputy chairman of the London, Brighton and South Coast Railway Company, and for one year director, proved that Francis Fuller was usually their auctioneer to sell when they had property to sell, and that he had done so since he had been at the Board, and that he knew as a director that there was a sale of surplus lands in 1859, and that he knew of the catalogue marked W. being published in 1859; that it was the province of their solicitor, Mr. Faithfull, to settle the conditions, and that he was employed by the Company for that purpose in the preparation of the sale; that the sale was on the 22d June, 1859; that the catalogue or particulars marked W. were used at the sale; that he called at Mr. Fuller's on the subject of the sale and saw a catalogue there, and that some of the lots were withdrawn before the sale.

George Faithfull, solicitor of the London, Brighton and South Coast Railway Company, proved that the conditions of sale mentioned in the particulars were prepared at his office; that he had been solicitor to the *876] Company for more than ten years; that he received the *draft of the conditions of sale from Mr. Fuller, and Mr. Fuller sent him the particulars of the sale marked W.; that he settled the conditions of sale and sent them to Mr. Fuller; that he attended the sale as solicitor for the Company on the 22d June, 1859; that the property was put up for sale; that there were bidders; that the purchasers prepared the drafts of the purchase deeds, which were sent to him for perusal on behalf of the Company; that he charged the Company for settling them, and received money on behalf of the Company for lands then put up for sale at the Auction Mart, and paid it over to the Company; that the particulars, marked W., were used at the sale.

The question for the opinion of the Court was, Whether the plaintiff was entitled to recover all or any, and if any what, portion of the lands coloured pink on plan No. 1. The Court was to have power to draw all inferences of fact which a jury might draw.

The case was argued by

Lush (*Baylis* and *Murphy* with him), for the plaintiff.

Bovill (*Denman* and *Hannen* with him), for the defendants.

The arguments appear from the judgment.

BLACKBURN, J.—We have considered this matter a good deal while the arguments proceeded, and therefore need not take further time. We think the plaintiff is entitled to judgment. I will presently point out the manner in which, and what quantity of land he is entitled to recover.

*By the Croydon and Epsom Railway Act, 7 & 8 Vict. c. xcii. s. 216, “for the purpose of making provision respecting the sale [*877 of lands acquired by the Company under the provisions of this Act, but which shall not be required for the purposes thereof,” it was enacted, “That the Company shall sell all such superfluous lands, &c.; and such sales and conveyances shall take place within ten years after the passing of this Act.” That Act was passed on the 29th July, 1844, so that the ten years there mentioned ended on the 29th July, 1854. By sect. 217 it was enacted, “That if the Company do not sell such lands within the period aforesaid, then such lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same.” These provisions are precisely similar to sect. 127 of The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. The plaintiff is the owner of lands adjoining the land coloured pink in the plan, marked No. 1, and the first question is, whether that land comes within the description in sect. 216, “lands acquired by the Company under the provisions of this Act, but which shall not be required for the purposes thereof.” As to this, we must put ourselves back to the time of the trial and verdict in 1861. In the first place, by sect. 5 of stat. 9 & 10 Vict. c. cclxxxiii., the Croydon and Epsom Railway was vested in The London, Brighton and South Coast Company, and by sect. 1 it was enacted that the powers and privileges given to the Croydon and Epsom Company should be vested in and exercised by The London, Brighton and South Coast Company in the same [*878 *manner and as fully and effectually as if the last-mentioned Company had been named in the recited Act instead of the Croydon and Epsom Company: therefore we have to look at the case in 1861, exactly as if The London, Brighton and South Coast Company had been the Company who had obtained the Act, instead of The Croydon and Epsom Company. Evidence was given that as to a portion of the land coloured pink the former owner had received notice to treat from the older Company, and that after he had executed the conveyance, which was not produced, he had been paid the price for it. The land of which he had thus divested himself had, from that time, been enjoyed by the Company, or their tenants, and was down to the time of the trial in the occupation of their tenants. As to the other lands coloured pink, and numbered 61, 62 and 63, which had belonged to a different proprietor; at the time the Company gave their notice to treat they were in the tenancy of a person named Morley, who held them for a term of years which would expire in 1857. It does not appear affirmatively that the Company had given him notice to quit, and he continued in occupation; but the Company had acquired the reversion in the lands, for he paid, and they received rent till 1857, when his interest under the lease ceased,

and from that time until the trial the Company had received rent from him, he continuing on as their tenant from year to year. That was strong evidence, as against the Company, that in some way they had acquired the reversion in the lands, although not the particular interest which Morley had, because he enjoyed it down to the year 1857.

One part of Mr. *Bovill's* argument was that sect. 216 of The Croydon and Epsom Railway Act, making provision for the sale of "lands acquired by the *Company under the provisions of this Act, but *879] which shall not be required for the purposes thereof," did not extend to lands the reversion in which had been acquired, but must be limited to lands acquired with the right to immediate possession, so that the Company might enter upon and apply them to the purposes of the railway; and consequently that the effect of the existing outstanding tenancy of these lands in Morley was to prevent them being lands acquired by the Company; and he was unwilling to admit that the same reasoning would apply if there were a tenancy from year to year, and the Company had not given notice to quit. But I think the cases are the same. A railway Company, upon giving compensation, take lands and force owners to sell. And the intention of the Legislature in the special Act and in The Lands Clauses Consolidation Act, 1845, was, that whatever lands such a Company acquire under the provisions of either Act for the purposes of the Act, should be subject to this condition, that, if the lands are not used for those purposes within the prescribed period, in the present case ten years, they are to vest in and become the property of the owners of the adjoining lands "in proportion to the extent of their lands respectively adjoining thereto." That is the scheme of both Acts, the object being that where lands are taken from proprietors by compulsion of law, in order that particular works may be executed, if they are not executed the lands shall first be offered to the persons then entitled to the lands (if any) from which they were originally severed; and if such persons refuse to purchase them the like offer shall be made to the owners of the adjoining lands. And that applies *880] as much to the reversion, or other partial *interest in lands which the Company have compulsorily acquired, as to the fee simple in possession. Neither in the reason of the thing, nor in the words of the enactment, is there any distinction between them. And by the interpretation clauses, sect. 351 of stat. 7 & 8 Vict. c. xcii. and sect. 3 of The Lands Clauses Consolidation Act, 1845, the word "lands" extends to "hereditaments of any tenure."

Then were these lands superfluous lands not used for the purposes of the Act? The Company were in possession of and actually enjoying the land by receiving the rents from agricultural tenants, who were occupying it as ordinary inhabitants of cottages: it is clear therefore that the land, *de facto*, had never been applied to the purposes of the Act for making the railway; and the Company, thinking possibly that sect. 127 of The Lands Clauses Consolidation Act, 1845, allowing ten years after the expiration of the time limited by their Act for the completion of the works applied, waited too long before they took any step to sell. At length they advertised them as "superfluous lands," which certainly is strong evidence that they were in fact such. But independently of this, if these lands had been appropriated to any of the purposes of the Act so that they ought not to be considered "superfluous lands," that was,

fact within the knowledge of the Company. The defendants were required to prove it, and to displace the *prima facie* case to the contrary, but they did not do so. Therefore the whole of the land coloured pink is land acquired by the Company under the provisions of the Act, but not required for the purposes of the Act, and consequently is superfluous.

Mr. *Bovill* says that the plaintiff's land coloured green does not adjoin plots 61, 62 and 63. If we *were considering whether it was adjoining those plots at the time when they were originally acquired, that would be true; but the Act speaks of "the owners of the lands adjoining thereto," that is, at the time when the land is to vest in those owners, and at that time, in 1854, the whole of the land coloured pink was taken as one piece of ground acquired by the railway. Sect. 218 of stat. 7 & 8 Vict. c. xcii., which provides to whom the offer to sell the land shall be made, and the corresponding section 128 of The Lands Clauses Consolidation Act, 1845, show that the Legislature meant the owners of the lands at that time. [*881]

I have hitherto treated the case with reference to the state of the law as it was in 1861, when the verdict was found, but in 1863 the railway Company, in promoting their Act, 26 & 27 Vict. c. xcii., got the following clause inserted in it:—"The respective periods by the several Acts relating to the Company limited for the sale of their superfluous lands are hereby respectively extended for five years from the passing of this Act, and those several Acts shall be read and construed as if that period had been fixed by each of those Acts respectively." It is contended, for the defendants, that we are to suppose that the Legislature by that clause intended to say that these Acts of Parliament shall be read now as if they had been framed with the words of this clause interpolated into them, and so the vested interest which the plaintiff has in consequence of the period of ten years having elapsed some years before,—and more than that, the vested interest which he recovered by the verdict, and which he was only prevented from being in possession of by the delay of the law, is to be defeated by this *ex parte* legislation *in a private Act of Parliament. I hope, for the sake of The London, Brighton and South Coast Railway Company, that when they introduced that clause they did not intend it should have that effect. If they so intended, and had admitted that such was their intention, the Legislature certainly never would have passed it; but the words used do not express that meaning. It is a general rule of construction, especially applicable to private legislation, that an enactment shall not be construed retrospectively to defeat vested interests, unless such an intention of the Legislature be clearly expressed. Here the words are, "the respective periods by the several Acts relating to the Company limited for the sale of their surplus lands are hereby respectively extended." The meaning of those words even without the aid of the rule of construction referred to is, that where there is an existing limited period which is not yet run out, so as to give the other party a vested right, that is a period capable of being extended. [*882]

Therefore, we come back to the question about which there is most difficulty, what is meant by "owners of the lands adjoining," in sect. 217 of stat. 7 & 8 Vict. c. xcii., which says that the superfluous lands remaining unsold at the expiration of ten years after the passing of the

Act shall "vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same"? Looking at the east end of the plan, it appears that the plaintiff's land, coloured "green," continues by a line not quite parallel with the Croydon and Epsom Railway until it meets the land of Turner, which then becomes the land adjoining to that acquired by the *883] Company under the provisions, but not used for the purposes of their Act. The boundary of Turner's land is not parallel to the railway—nor is it perpendicular—but it slants off. One view suggested by Mr. *Lush* was, that perchance the different owners of the lands adjoining were to be tenants in common, and to have the superfluous lands apportioned among them. I do not think that is the true construction, and for this reason: we know that the limits of deviation run parallel to the proposed line of a railway for many miles, and it might happen that the Company had acquired a strip outside the railway along the whole line from one terminus to another, which would be superfluous land; and to hold that the owners of all the adjoining lands from Croydon to Brighton should take as tenants in common, would be extremely inconvenient, and it is certainly very unlikely that such was the intention of the Legislature. And they have not used words pointing to that; they say the property is to vest in the owners of the lands adjoining, "in proportion to the extent of their lands respectively adjoining the same,"—it is plain that the intent of the Legislature was, that the owner of each parcel of land adjoining should have a proportion of the superfluous lands.

What then is meant by the words "in proportion to the extent of the lands adjoining thereto"? It cannot be according to the depth; so that a man who has a narrow slip adjoining is to have only a bit in proportion to it, and a man who has many acres within a ring fence is to have a piece increased in proportion. Further, if the apportionment is to be made in proportion to the limit of the frontage, it would follow that *884] there is to be a rule-of-three sum. That would *give to Turner, whose fence is in a slanting direction, a larger proportion than to the plaintiff, whose fence is nearly parallel to the railway. That again would not carry out the object of the Legislature. I admit the words are not clear. But I think the true meaning is this: that you must go to the point where the boundaries of the two adjoining owners meet, and draw a straight line from that point to the nearest point of the land actually used by the Company for their works, and then the land on Turner's side would be Turner's, and that on the plaintiff's side would be the plaintiff's. The plaintiff is entitled to recover on the eastern boundary up to the straight line drawn from the point where his land and Turner's meet, to the nearest point of the land used by the Company for the purposes of the railway. That is nearly, but not quite, the same as a line drawn perpendicularly to the railway. The effect is, that there would be a little corner at the top of the existing fence, given to Turner, and a little corner at the bottom which would be cut off and given to the plaintiff.

On the western boundary, I thought at first a puzzling question arose from the term "adjoining," whether the high road there was adjoining land within the meaning of the Act, so as to entitle the owner of the soil of the road to a portion of the superfluous lands. It is the property of some person in fee, though of very little use unless there happen to

be minerals under it. But the adjoining part marked "formerly road," has been so occupied by the tenants of the land coloured pink, that it has in fact, become part of the land which the Company are enjoying; and though probably it would not be theirs absolutely, as the *twenty [*885 years have not expired, their tenants have encroached upon it for their benefit as landlords. Upon that however we give no opinion. Supposing the road to be considered as adjoining the plaintiff's land, a line drawn from the corner of it to the nearest point of the railway, would include part of what was formerly road, and the whole of the land coloured pink; but the plaintiff not having claimed more than the land coloured pink by his writ, it is not necessary for us to decide how much of that coloured yellow he might claim.

For these reasons, we think the plaintiff is entitled to our judgment; and, if the parties cannot agree, the sheriff will have to give him possession of the whole of the land coloured pink on the west side, and on the east side down to a straight line drawn from the corner where the boundaries of Turner's land and the plaintiff's intersect to the nearest point of the land acquired by the Railway Company and used by them for the purposes of their Act.

MELLOR, J., had left the Court.

SHEE, J., concurred.

Judgment for the plaintiff.(a)

(a) Error has been brought upon this judgment.

*The QUEEN v. The Local Board of Health of the Borough of GODMANCHESTER. Nov. 23. [*886

[Affirmed in Scac. Cam., postea 936.]

Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 43.—Sewer.—Drain or watercourse set out under Enclosure Acts.

A brook, the water of which was supplied by the drainage, natural and artificial, of a considerable area of cultivated soil belonging to private individuals, received at the lower end of it, near a river into which it flowed, the drains of two or three inhabited houses. By the General Enclosure Act, 41 G. 3, c. 109, s. 10, the Commissioners are to set out and appoint private roads, drains, watercourses, &c., and the same shall be made and supported and kept in repair at the expense of the owners of the lands, directed to be divided and enclosed, in such proportions as the Commissioners shall direct. In 1809, Commissioners acting under a local Enclosure Act, by their award set out this brook, among others, as a "public drain or watercourse," and directed that all such drains should be made, scoured and kept in repair at the expense of the proprietors of the lands, divided and enclosed by virtue of the Act, in equal proportions. They also cleared out the channel of the brook, and in various places widened and deepened it to render it more efficient as a means of draining a portion of the tract of land which was subject to the provisions of their Act. Afterwards two of the landowners, for their own convenience, altered the course of the stream, by cutting artificial channels for short distances. The brook is within the corporate borough of G., and it having become a nuisance, a mandamus issued to the Local Board of Health of G. to clear, cleanse, empty and keep it.

1. *Seemle*, that it was not a "sewer" within The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 43.

2. Held that, if it were, it was within the second exception in that section of "sewers made and used for the purpose of draining, preserving, or improving land under any local Act of Parliament," and therefore was not vested in the Local Board of Health.

3. Per Crompton and Shee, JJ., that it was also within the first exception of "sewers made by any person or persons for his or their own profit."

4. *Quære*, per Cockburn, C. J., and Crompton, J., whether sect. 43 includes sewers or streams which are private property?

MANDAMUS to the Local Board of Health of the borough of Godmanchester, reciting that there existed in that borough, and within the limits of the jurisdiction of the Local Board of Health, a certain drain and sewer and watercourse, called and known by the name of Stonehill Brook [describing its course], which drain and sewer and watercourse *887] was vested in and was under the management *and control of the Local Board. And that it was the duty of the Local Board, under the provisions of The Public Health Act, 1848, to cause the drain, sewer and watercourse to be properly scoured, cleansed, emptied and kept so as not to be a nuisance or injurious to health. And that the drain, sewer and watercourse was in a foul, unclean and improper state and condition, so as to be a nuisance and injurious to health, and further that for want of the same being properly scoured, cleansed, emptied and kept it was liable to overflow and damage, and the water thereof had on several occasions overflowed and greatly damaged the lands of divers persons adjoining and near to it, and also a certain public way called Graveley Way. The writ commanded the Local Board to cause to be properly cleared, cleansed, emptied and kept, the drain, sewer and watercourse, &c., according to the terms and provisions of The Public Health Act, 1848.

Return. (1) That the drain, sewer and watercourse called Stonehill Brook was not a sewer vested in or under the management and control of the Board of Health, nor was it their duty, under the provisions of The Public Health Act, 1848, to cause the drain, sewer, and watercourse to be scoured, cleansed, emptied, or kept so as not to be a nuisance or injurious to health; (2) that the drain, sewer and watercourse was a sewer made and used for that purpose of draining, preserving or improving land under a local and private Act of Parliament passed in the 43 G. 3, intituled, &c., and that the sewer ought to have been, and still ought to be, repaired, scoured, cleansed, emptied and kept by and at the expense of all the proprietors of the lands and grounds which were divided and enclosed by virtue of that Act of Parliament, and not by the Local *888] Board; (3) that the drain, sewer and watercourse was not in a foul, unclean, or improper state or condition, so as to be a nuisance, or injurious to health; (4) that it had not overflowed and damaged the lands adjoining and near to it or the public way.

There were four pleas traversing the allegations in the four paragraphs of the return.

Issues thereon.

On the trial, before Wightman, J., at the Summer Assizes for Huntingdonshire, in 1863, it was referred to an arbitrator to settle and determine the question as to the origin, nature and extent of the Stonehill Brook, what was done thereto by the Enclosure Commissioners, what alterations if any, what repairs if any, were from time to time done, and by whom. The facts to be settled in a special case, and the Court to draw conclusions from the facts.

The following is the special case, of which the writ, return and pleadings were to form part.

In the year 1802, The Godmanchester Enclosure Act was passed, entitled "An Act for dividing and enclosing certain open and common fields, meadows, lands, commons and commonable places within the parish of Gumcester, otherwise Godmanchester, in the county of Huntingdon." (This Act was to be referred to as part of the case.)

The Commissioners appointed under that Act made their award under the same on the 23d June, 1809, and by it they did set out and appoint, order and direct, among other things, "one other public drain or watercourse four feet wide beginning at the London turnpike road, into and over an allotment to the Dean and Chapter (meaning the Dean and Chapter of Westminster) and their lessee, along Shooters' Hill, and thence through *and over the allotments to S. Bleckley, Lady [*889 O. Sparrow and J. Martin, to and across Graveley Way, and thence over an allotment to G. Maule, into an ancient watercourse leading into the town-street of Godmanchester, along part of the town-street and thence into the river Ouse." And the Commissioners did by their award direct (inter alia), "That all such drains and bridges shall be made and for ever maintained, supported, scoured and kept in repair by and under the directions of the surveyors of the highways for the time being of the said parish of Godmanchester, at the expense of all the proprietors of lands and grounds divided and enclosed by virtue of the said Act, in equal proportions."

The drain or watercourse is known by the name of Stonehill Brook, and is situate within the corporate borough of Godmanchester, a district within the meaning of The Public Health Acts, exclusively consisting of the whole of the corporate borough within and for which the defendants are the Local Board of Health under the said Acts. The award of the arbitrator was then set out, which stated as follows:—

“The Stonehill Brook runs in the course which is delineated on the map hereto annexed, commencing at the road called the London Road, and passing from thence through land called and known as The Dean and Chapter's Land, thence through land called Bleckley's Farm, thence through land called Lady O. Sparrow's Land, thence through the lands of various proprietors crossing a road called West Street and terminating in the river Ouse. The whole length of its course between the London Road and the river Ouse is about one mile and a half. The water of Stonehill Brook between the London Road and West Street is solely supplied by the drainage, natural and artificial, of a considerable area of *cultivated soil; but at West Street the drains of two [*890 or three inhabited houses empty themselves into the brook, and between West Street and the river Ouse the water of the brook stands at the level of that of the Ouse. With the exception of the drains at West Street just mentioned, no drains other than the drains underground and open of purely agricultural land discharge themselves into the brook. The channel of the brook is the natural channel of a certain natural stream, except so far as its character is altered by the facts next mentioned. The Enclosure Commissioners, acting under a local Enclosure Act of the 43 G. 3, between the years 1802 and 1809, cleared out the channel of the said natural stream, and in various places along its course somewhat widened and deepened it, to render it more efficient as a means for draining a portion of the tract of land which was subject to the provisions of the said Act. Afterwards the owner of Bleck,

ley's Farm, for greater convenience in subdividing his fields, diverted the course of the said natural stream by cutting for it an artificial channel, which commences at the point where the said natural stream entered Bleckley's Farm from the Dean and Chapter's Land, and which artificial channel, after running a length of about 7 chains, re-entered the old channel, the intervening portion of the old channel being filled up and destroyed. For the same purpose, and about the same period, the owner of Lady O. Sparrow's Land also diverted the course of the said natural stream by making for it an artificial channel, which commenced at the point where the natural stream passed from Bleckley's Farm to Lady O. Sparrow's Land, and which artificial channel, after running a length of about 18 chains, re-entered the old channel very nearly at the *891] further boundary of Lady O. Sparrow's Land, the *old channel being partially filled up, but being left and still remaining capable of acting as an escape channel for surplus waters. The natural channel of the said natural stream so altered and affected as just described constitutes the existing channel of Stonehill Brook. The width of the channel of Stonehill Brook varies from about 4 feet at its upper extremity to about 15 feet at its lower, and its depth from about 3 feet to about 5 feet between the same limits. Before the enclosure under the Enclosure Act, Stonehill Brook was cleared out and repaired sometimes at the joint expense of all the owners of the land subject to the provisions of that Act, and sometimes by paupers of the parish of Godmanchester, under the direction of the overseer of the poor of the said parish for the time being, and paid by him out of the general poor's rates of that parish. After the enclosure for a short time Stonehill Brook was cleared out and repaired when necessary by the paupers of the parish of Godmanchester, under the direction of the overseer of the poor of that parish for the time being, and paid by him out of the general poor's rates of the parish; but for the last thirty years or thereabouts it has been cleaned out and repaired by the owners of the lands through which it passes, each doing that portion of it which traverses his own land."

It was admitted that Stonehill Brook was in a foul, unclean and improper state and condition so as to be a nuisance and injurious to health, and that for want of being properly scoured, cleansed, emptied and kept, was liable to overflow and damage, and had overflowed and damaged; the lands adjoining and near to it and the public way called Graveley Way.

The question for the opinion of the Court was, Whether the prosecutor or the defendants was or were *entitled to the verdict on *892] the first and second pleas to the return to the writ.

The General Enclosure Act, 41 G. 3, c. 109, s. 10, enacts, "That such Commissioner or Commissioners shall, and he or they is and are hereby empowered and required to set out and appoint such private roads, bridleways, footways, ditches, drains, watercourses, watering places, quarries, bridges, gates, stiles, mounds, fences, banks, bounds, and landmarks in, over, upon, and through or by the sides of the allotments to be made and set out in pursuance of such Act, as he or they shall think requisite, giving such notice and subject to such examination, as to any private roads or paths, as are above required in the case of public roads, and the same shall be made, and at all times for ever there-

after be supported and kept in repair, by and at the expense of the owners and proprietors for the time being of the lands and grounds directed to be divided and enclosed, in such shares and proportions as the Commissioner or Commissioners shall in and by his or their award order and direct."

The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 2, (Interpretation Clause), enacts: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom, with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed.

"The word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies."

Sect. 43 enacts, "That all sewers, whether existing *at the time when this Act is applied or made at any time thereafter, [*893 (except sewers made by any person or persons for his or their own profit, or for the profit of proprietors or shareholders, and except sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating land, and sewers under the authority of any Commissioners of sewers appointed by the Crown), together with all buildings, works, materials, and things belonging or appertaining thereto, shall vest in, belong to, and be entirely under the management and control of the Local Board of Health."

The case was argued November 19 and 23, and judgment given on the latter day.

Keane (*Douglas Brown* and *Markby* with him), for the prosecutor.—First. At the time when The Public Health Act, 1848, 11 & 12 Vict. c. 63, was applied to the borough of Godmanchester, Stonehill Brook was a sewer and therefore vested in the defendants under sect. 43, who are consequently bound to cleanse it. In Tomlins' Law Dictionary a sewer is said to be "a fresh water trench, or little river encompassed with banks on both sides, to carry the water into the sea, and thereby preserve the lands against inundations, &c." [CROMPTON, J.—According to that definition a Local Board of Health would have to cleanse such a river as the Thames.] Stonehill Brook is not a drain within the meaning given to that word in sect. 2 of stat. 11 & 12 Vict. c. 63, which is adopted in the interpretation clause, sect. 250, of The Metropolis Local Management Act, 18 & 19 Vict. c. 120; but has by means of drains, received the sewage *from two or three inhabited [*894 houses. [COCKBURN, C. J.—If a natural stream flows so near inhabited houses that their sewage drains into it, it becomes a sewer. But it does not follow that the whole of the upper part of that stream which flows through and is used for the drainage of cultivated land becomes a sewer.] Sect. 145 of stat. 11 & 12 Vict. c. 63, which limits the authority of the Local Board as to the subjects with which they may interfere, mentions "any sewers or other works already or hereafter made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament;" and what "works" were intended is shown by sect. 68 of stat. 21 & 22 Vict. c. 98, which

repeals sect. 145 of the former Act, and substitutes a classified description of subjects with which the Local Board are not to interfere. If they have not power over such streams as this, they must be at the expense of purchasing them under sect. 44 of stat. 11 & 12 Vict. c. 63. [He also referred to section 46.]

Secondly. Stonehill Brook is not within any of the exceptions in sect. 43 of stat. 11 & 12 Vict. c. 63. It is not a sewer made by any persons "for their own profit," which must mean for profits of trade. The only advantage to the landowners from the widening and deepening of the channel by the Commissioners was the preventing it being choked up. In *Coe v. Wise*, 5 B. & S. 440, the Judges of this Court were of opinion that the participation by drainage Commissioners in the beneficial results arising from the construction and maintenance of the works was not a profit to them so as to render them liable to an action by the owners of lands for damage caused by want of skill and care in the persons employed by the Commissioners. Nor is Stonehill Brook *895] "within the exception of 'sewers made and used for the purpose of draining, preserving, or improving land under any local or Private Act of Parliament.'" That exception applies to a sewer for the making of which an Act of Parliament has been passed, and not to a sewer which persons acting under an Act of Parliament might choose to make. Further, this is a natural stream, and was not "made," but only widened and deepened by the Commissioners under the authority of The Godmanchester Enclosure Act. The General Enclosure Act, 41 G. 3, c. 109, s. 10, does not give Commissioners power to make drains, but only to set them out: *The Earl of Falmouth v. Richardson*, 3 B. & C. 837 (E. C. L. R. vol. 10). Also, sect. 68 of stat. 21 & 22 Vict. c. 98, to amend The Public Health Act, 1848, does not prevent the defendants interfering with Stonehill Brook, because it is not a sewer made and used for the purpose of draining, preserving, and improving lands under a local or private Act of Parliament. [COCKBURN, C. J.—The owners have since materially altered it.] They made only trifling alterations: in one instance the old channel was left and may be used; in another there was the substitution of an artificial channel for a short distance. The Commissioners acting under The Godmanchester Enclosure Act set out Stonehill Brook as "one other public drain or watercourse," and therefore it is not included in their direction "that all such drains and bridges shall be made and for ever maintained, supported, scoured and kept in repair" by the surveyor of the highways "at the expense of all the proprietors of lands and grounds divided and enclosed by virtue of the said Act in equal proportions." The drains here meant as well as *896] the bridges must be private: public drains and bridges were not intended to vest in the Commissioners of Sewers. Nor is this brook governed by The General Enclosure Act, 41 G. 3, c. 109, s. 10, which empowers the Commissioners to set out and appoint private drains; to make which there is no power under the private or The General Enclosure Act. [COCKBURN, C. J.—How can this brook, which flows through the lands of several proprietors, be public?] The award does not state for what purpose it was made. [SHEE, J.—The private Act also mentions bridleways.] They may be private. If the Commissioners included this brook in their direction, the duty of surveyors of highways, imposed on them by The Highway Act, 5 & 6 W. 4, c. 50,

s. 67, and The Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, s. 21, is transferred to the defendants by stat. 11 & 12 Vict. c. 63, s. 117. Moreover, the sewer must not only be made, but also used under the private Act.

Joseph Brown (Metcalf with him), for the defendants.—First. Stonehill Brook is not a public sewer vested in the Local Board of Health under sect. 43 of stat. 11 & 12 Vict. c. 63. By sect. 2, the words and expressions specified in it are to have the meanings assigned to them, “unless such meanings be repugnant to, or inconsistent with, the context or subject-matter in which such words and expressions occur:” and the preamble of the statute shows that the word “sewer” was intended to apply to sewers in the more limited and popular sense of the word, viz., sewers for the drainage of towns and populous places. [He referred to *Paul v. James*, 1 Q. B. 832 (E. C. L. R. vol. 41).] Sect. 44 gives the Local Board power to purchase the rights, privileges, powers and [*897] authorities vested in any person for making sewers, &c.; which shows the Legislature did not intend by sect. 43 to take away a private watercourse from the landowners, and vest it in the Local Board. The power of purchase under sect. 44 is not compulsory, and sect. 84, which gives the power of purchasing lands by agreement, incorporates The Lands Clauses Consolidation Act, 1845, “except the parts and enactments of that Act with respect to the purchase and taking of lands otherwise than by agreement.” [Keane referred to stat. 21 & 22 Vict. c. 98, s. 75.] By that statute the Local Board have a compulsory power of purchase subject to claims for compensation. When a private sewer becomes a nuisance the Local Board may call upon the owner to cleanse it, and if he omits to do so they may cleanse it and charge him with the expenses.

Secondly. Stonehill Brook is within either the first or second exception in sect. 43 of stat. 11 & 12 Vict. c. 63. It does not differ from a drain or watercourse made for draining land under an enclosure Act or under a local drainage Act. It was part of the common existing before and enclosed under The Godmanchester Enclosure Act. The Commissioners in setting it out intended to exercise the powers, given in sect. 10 of The General Enclosure Act, 41 G. 3, c. 109, of setting out private drains and watercourses; and if the directions in that section were not strictly pursued, it is not taken out of the exception in sect. 43 of stat. 11 & 12 Vict. c. 63. The word “private,” in sect. 10 of stat. 41 G. 3, c. 109, overrides “watercourses,” as well as “roads,” “gates,” “stiles,” and other things enumerated in it. [COCKBURN, C. J.—The section also mentions “quarries.”] Though the Commissioners set out Stonehill Brook as public, it is a drain or stream for the benefit of a certain number of landowners, and *is public only in that sense. [COCKBURN, C. J. [*898]—It does not appear in whom the soil of the brook is vested. It may be a question whether it remains in the lord of the manor, or belongs to the riparian proprietors *ad medium filum aquæ*.] The case does not set out that part of the award which allots the land on the banks. [CROMPTON, J.—It might be a public drain though the soil was vested in the landholders. But this brook is not public for all the subjects of the realm; certain landowners only have a right to use it; as the inhabitants of a town or as commoners have a right to use some easement or franchise.] Also, Stonehill Brook is within the first exception in sect.

43 of stat. 11 & 12 Vict. c. 63; the landowners may be said to have made it must have been made at their expense, and it was made for the benefit of their land. At any rate, in the two diversions of the stream made by private landowners the channel was so made; and as to those the mandamus could not be supported, and being bad as to part is invalid altogether: *Reg. v. The Tithe Commissioners*, 14 Q. B. 459, 479 (E. C. L. R. vol. 68).

If Stonehill Brook is vested in the Local Board, the effect would be to cast the expense of cleansing it in the proportion of three-fourths on the householders and one-fourth only on the owners and proprietors of the lands and grounds divided and enclosed under The Enclosure Act, who have hitherto been liable under stat. 41 G. 3, c. 109, s. 10, and who are almost exclusively benefited by it. [He referred to the second proviso in the rating clause, sect. 88 of stat. 11 & 12 Vict. c. 63, slightly altered by stat. 21 & 22 Vict. c. 98, s. 55.]

Keane, in reply.—By sect. 58 of stat. 11 & 12 Vict. c. 63, the duty *899] of cleansing a private sewer or drain *which has become a nuisance, if the persons causing the nuisance fail to comply with a notice to remove it, is imposed on the Local Board, and the mode of raising the money for defraying the expenses incurred by them so doing is in their discretion. The second proviso in sect. 88 shows it was contemplated by the Legislature that agricultural property should form part of a district under a Local Board of Health.

COCKBURN, C. J.—Our judgment must be for the defendants. I entertain serious doubts whether The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 43, which vests certain sewers in the Local Board to be appointed under that Act, includes sewers which are private property. It is very unusual for the Legislature to interfere with private rights without making compensation to the owners. Whenever they do so, the powers of The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, with reference to compensation, are usually incorporated in the special Act. The effect of this mandamus is to compel the Local Board to take possession of a sewer or watercourse, and treat it as theirs, without any reference to the rights of the proprietors of the land through which it flows. Suppose, at the point where Stonehill Brook reaches West Street, the proprietor of the soil over which it passes were the proprietor of all the land above as well as immediately below the houses which drain into it in West Street; and suppose the owners of those houses had acquired no right by way of easement to drain into it, and he signified his intention to stop their doing so, and to bring an action if they continued, and the Local Board stepped in and said “The *900] sewer is ours.” This reduces the case to an absurdity, *and shows that the enactment was not intended to interfere with rights of a private nature. At all events, I cannot think that in the case of a natural stream such as this, which for the greater part of its course flows through and drains agricultural lands, simply because it comes within the ambit of a borough, and a few houses drain into the lower end of it, the whole becomes a sewer, and as such vests in the Local Board under sect. 43. I should pause before I came to that conclusion, as it leads to serious consequences, involving an invasion of private rights.

But it is not necessary to decide that point, because this stream, if within sect. 43 of stat. 11 & 12 Vict. c. 63, is also within the second

exception of sewers "made and used for the purpose of draining, preserving, or improving land, under any local or private Act of Parliament." The case finds that the enclosure Commissioners set out this brook as a "public drain or watercourse"; but the only way in which they could deal with a natural stream would be by making it available for the drainage of the lands enclosed. And, the brook having been so set out, the case also finds that the Commissioners directed that all drains set out should be scoured and kept in repair at the expense of the proprietors of lands and grounds divided and enclosed. And this is in pursuance of stat. 41 G. 3, c. 109, s. 10, which enacts that "the same shall be made and at all times for ever thereafter be supported and kept in repair by and at the expense of the owners and proprietors for the time being of the lands and grounds divided and enclosed." But then it is said that, according to the finding of the learned arbitrator, the drain was made by the Commissioners, for he states that they cleared out the channel *and in various places somewhat widened and deepened [*901 it; but it appears from the rest of the case that they acted under the provisions of the Godmanchester Act, which was passed after stat. 41 G. 3, c. 109. And, sitting as a jurymen, I come to the conclusion that the drain was made by the Commissioners on behalf of the landowners, and must be taken to have been made at the expense and by the assent of the landowners. It has been decided that, if Commissioners acting under stat. 41 G. 3, c. 109, make private roads, they cannot levy a rate to reimburse themselves; *The Earl of Falmouth v. Richardson*, 3 B. & C. 837 (E. C. L. R. vol. 10): and we cannot suppose that these Commissioners did that which was against law. At this distance of time we should presume that all things were rightly done; and therefore the clearing out of the channel of this brook by the Commissioners ought not to be taken to have been done in excess of their powers, nor without the assent of the landowners. If so, this is a sewer made under the Godmanchester Act for agricultural purposes, and is within the second clause of the exception in sect. 43 of stat. 11 & 12 Vict. c. 63.

CROMPTON, J.—It is difficult to arrive at a clear understanding of this case, but I have come to the same conclusion as the Lord Chief Justice, very much for the same reasons. We are to say as jurymen, how the verdict on the first and second issues is to be entered. And the question is, whether this watercourse has become vested in the Local Board under sect. 43 of stat. 11 & 12 Vict. c. 63, so as to impose upon them the duty of repairing and cleansing it. I have great doubt whether that section has any application to private streams, though we need not decide that point. And *certainly it does not enact that every [*902 stream flowing through, and for the greater part of its course naturally draining, agricultural land, becomes a sewer and vests in the Local Board because it receives the drainage of a few houses just before it enters a river. In reading the words in sect. 63, "sewers, whether existing at the time when this Act is applied or made at any time thereafter," "sewers made" and "sewers made and used," I think the Legislature did not intend anything so monstrous as to take all natural streams out of individuals and vest them in the Local Board. Nor do I think it was intended to vest in this Local Board that portion of Stonehill Brook which is within the ambit of the borough of Godmanchester. It never has been made a sewer unless it was made so by the

Commissioners acting under the enclosure Act; and manifestly the upper part of the brook would not be public to all persons. I doubt whether the widening and deepening it, or altering the sides of the banks, was a making of it. But if it were a sewer made by the Commissioners, it was made by them under the local Act; in one part of the case it is said that the Commissioners set it out. As a juryman I should find that means that it was made by their authority; but if they did it themselves, a jury would say that it was done with the sanction of the landowners. If therefore it comes within the 43d section as a sewer, it also comes within one of the exceptions, either as made by persons for their own profit, or as made and used for the purpose of draining or improving land under a local Act.

SHEE, J.—This stream was not, for its whole length at any rate, a
 *903] sewer within the meaning of sect. 43 of *stat. 11 & 12 Vict. c. 63; and, if it were, I should be clearly of opinion that it was within one of the exceptions in that section.

Judgment for the defendants.(a)

(a) Error has been brought upon this judgment.

ALLDAY v. The GREAT WESTERN Railway Company. Nov. 2.

Railway Company.—Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 7.
 —Unreasonable condition.—Delay.—Over-carriage.

1. A railway Company issued a consignment note for the carriage of cattle from O. to B., one of the conditions of which was, "the Company are not to be amenable for any consequences arising from detention or delay in or in relation to the conveying or delivery of the said animals however caused:" held an unreasonable condition within the first proviso in sect. 7 of The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31. 1 C. P. Rep. 97.

2. *Semble*, a condition that a railway Company shall not be amenable for any damage arising from over-carriage, however caused, is also unreasonable.

THIS was an action against the defendants as common carriers for not delivering within a reasonable time certain beasts which had been bailed to them. There was a second count for conversion.

Pleas. First. Not guilty. Second. To the first count, denial of the bailment.

On the trial, before Keating, J., at the Warwick Summer Assizes for 1864, it appeared that, on the 13th November, 1861, the plaintiffs delivered some beasts to the defendants at their station at Oxford, to be carried to the Bordesley Station, Birmingham, for the market there, under the following consignment note, signed by the plaintiff.

"Consignment note signed by sender.

"Cattle, Sheep, Pigs, (reduced rates).

"To the Great Western Railway, Oxford Station.

"November 13, 1861.

*904] "Received from Allday of — the undermentioned *animals on the conditions stated below, and at special reduced charge below the rates authorized by law.

"To be sent to Bordesley Station.

"Special conditions.

"The loading and unloading is to be performed by the sender, and

any assistance voluntarily given by the Company's servants to be at the risk of the owner. The Company are not to be subject to any risk in receiving, loading, forwarding on transit, and unloading, nor to be amenable for any damage actual or consequential arising from suffocation, from being trampled on, bruised or otherwise injured, from fire or any other cause whatsoever, nor for any consequences arising from over-carriage, detention or delay in or in relation to the conveying or delivery of the said animals however caused.

"The Company is not bound to send the animals by any particular train, or to carry or deliver them within any certain or definite time, or in time for any particular market. If on the arrival of cattle and other animals at their destination no one shall be ready to receive the same on behalf of the consignee, the Company will, at the discretion of the superintendent of any station, send such animals into yards or other convenient places at the expense and risk of the sender or consignee, and if not claimed within seven days the same will be sold to defray expenses and pay charges. In order to guard against disappointment the public are recommended to 'give two clear days' notice of their intention to send cattle from any station, so that the Company may if possible provide trucks. And, to afford time for receiving and loading such cattle and stock, they should be at the station not less than two hours before the departure of the train by which they are intended to be conveyed.

" Truck.	Name.	Address.	Ticking column.	Number.	Description.	Mark.	Paid on £ s. d.	Paid £ s. d.	Remarks.
	All day							1 17 1	
	Bordesley			13	Beasts.		Pay	3	
	or							2 2 0	B. B.
	Bham.						Richard	Allday, Sender.	

Charges paid by

Checked by

Outwards Entered

"Free passes for drovers to take charge of cattle and other animals will be allowed according to the Company's regulations.

"N. B. The conditions cannot be altered or dispensed with by any person whomsoever, and are applicable to the whole distance carried over the Great Western, the Bristol and Exeter, the South Devon and the South Wales Railways, and any other railway in connection therewith or either of them."

Instead of delivering the cattle at the Bordesley Station, the train by which the defendants sent them did not stop there, but took them to the Hockley Station, Birmingham, which is farther on, in consequence of which delay the plaintiff, who ultimately found them there, did not receive them until it was too late to bring them to the market at Birmingham, and the cattle were injured by having been kept for several hours in the trucks without food or water.

It was objected by the defendants' counsel that they were protected

by the condition in the consignment note, but the learned Judge, holding it an unreasonable one, directed a verdict for the plaintiff, with leave to the defendants to move to enter a verdict. The damages were taken by consent at 15*l*.

*906] **Field* moved accordingly.—The defendants are protected by their contract from the consequences of any injury that may have occurred to these cattle. “The Railway and Canal Traffic Act, 1854,” 17 & 18 Vict. c. 31, s. 7, enacts, “Every such Company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such Company or its servants, notwithstanding any notice, condition, or declaration made and given by such Company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said Companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable: &c.” The section then provides, that the Company are not to be liable beyond a limited amount, in the event of loss of or injury to animals, unless the value be declared at the time of the delivery to the Company and extra payment made, the proof of the value to be on the person claiming compensation; and no special contract respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding unless signed by the person delivering such animals, &c. Here was no injury from delay, as the plaintiff received the cattle after they arrived. The statute provides for injury done to the animals by the default of the Company, who *907] in this case only carried them a little **too far*. [CROMPTON, J.—Then *how much farther* than their destination may a Company carry cattle or goods with impunity? In the present case could they have carried the cattle to Newcastle or Edinburgh?] That would not be reasonable. [He cited *Peek v. The North Staffordshire Railway Company*, 10 H. L. C. 473.] [COCKBURN, C. J.—Here the mischief is the immediate consequence of the neglect of the defendants. Suppose they left some perishable commodity exposed to the rain on a wet night, that would be an injury to the thing, and occasioned by the fault of the Company. CROMPTON, J.—Suppose fruit sent to the North is spoiled before it comes there. COCKBURN, C. J.—The construction of the defendants would indeed cripple the statute.]

COCKBURN, C. J.—There ought to be no rule here. If the question had rested on the point as to how far the statute applies in case of loss in consequence of over-carriage, I should have been strongly disposed to grant a rule. But it is not necessary to go into that question, for the defendants’ counsel admits there was evidence of injury to the cattle from delay. He relies, however, on the special contract, signed no doubt by the plaintiff, and then the question arises, is that contract reasonable? Certainly not: for it is not merely that the Company will not be responsible for delay, not only from over-carriage generally, and not limited to accidental circumstances independent of delay caused by the

Company, but they claim absolute immunity from all injury arising from delay caused by their own negligence. This I take to be an unreasonable condition, unless something appears which might make it inequitable in the sender to seek to exact from them the full extent of the ordinary *carrier's liability. Suppose a Company say, "We are [*908 entitled to charge a certain rate of carriage:" if so, of course they are liable to the liability of common carriers. But then this Company say, "We make this special contract, we will carry these animals for a lower price if you will release us from the liability attached to carriers, and will take your chance of the goods arriving at their destination." If a man enters into such a contract as that, it is unreasonable to say he is not bound by it. But although the expression "reduced charge" occurs in this contract, it does not appear to have been used with reference to a greater rate by which the sender might have gained additional security. The condition is, on the face of it, therefore, unreasonable, and the learned Judge at the trial was right in so holding.

CROMPTON, J.—I am of the same opinion. It is the most unreasonable thing ever heard of for a Company to say to a party, "Although you agree with us to take your cattle to A. B., we will send them two hundred miles farther." To sustain his argument, Mr. *Field* must go the length of contending that the Company have a right to say this. Then it is argued here was no loss or injury done to the cattle. But I am clearly of opinion here was an injury done to them directly and proximately from the act of the Company.

MELLOR and SHEE, JJ., concurred.

Rule refused.

*The QUEEN v. PURDEY. Nov. 12. [*909

Quarter Sessions.—Appeal.—Costs.—Convicting justices.—5 G. 4, c. 83.—12 & 13 Vict. c. 45.

A person convicted as a rogue and vagabond under stat. 5 G. 4, c. 83, s. 4, appealed to the Quarter Sessions under sect. 14 of the Act, having given notice of appeal to the convicting justices as required by that section. No one appearing to support the conviction, it was quashed. Held, that the Quarter Sessions were authorized by stat. 12 & 13 Vict. c. 45, s. 5, to award costs against the person who prosecuted the appellant, and could not award them against the convicting justices.

WILLIAM ASHLEY having been convicted before certain justices of the peace, as a rogue and vagabond, under stat. 5 G. 4, c. 83, s. 4, for having been found upon a certain enclosed yard in the occupation of James Purdey for an unlawful purpose, gave the convicting justices notice of appeal to the Quarter Sessions of Yarmouth, under sect. 14, which enacts "Any person aggrieved by any act or determination of any justice or justices of the peace out of Sessions, in or concerning the execution of this Act, may appeal to the next General or Quarter Sessions for the county, riding, division or place in and for which such justice or justices shall have so acted, giving to the justice or justices of the peace, whose act or determination shall be appealed against, notice in writing of such appeal, and of the ground thereof, within seven days after such act or determination, and before the next General or Quarter Sessions, and entering within such seven days into a recognisance, with sufficient surety,

before a justice of the peace for the county or place in which such person shall have been convicted personally to appear and prosecute such appeal; and upon such notice being given, and such recognisance being *910] entered into, such justice is hereby empowered to *discharge such person out of custody; and the Court at such General or Quarter Sessions shall hear and determine the matter of such appeal, and shall make such order therein as shall to the said Court seem meet, and in case of the dismissal of the appeal, or the affirmance of the conviction, shall issue the necessary process for the apprehension and punishment of the offender, according to the conviction."

No one appearing to support the conviction the Quarter Sessions quashed it, with costs to be paid by James Purdey to the appellant under stat. 12 & 13 Vict. c. 45, s. 5, which enacts, "Upon any appeal to any Court of General or Quarter Sessions of the peace the Court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such Court appear just and reasonable."

Keane, in Easter Term, 1864, obtained a rule to quash the order of Quarter Sessions on the ground that that Court had no jurisdiction to award costs against the prosecutor, but should have awarded them against the convicting justices.

Bulwer showed cause.—The decision of Hill, J., in *Reg. v. Smith*, 29 L. J. M. C. 217, is expressly in point against the present application, and is based on a previous decision, also in this Court, of *Rex v. The Justices of Hants*, 1 B. & Ad. 654 (E. C. L. R. vol. 20). [COCKBURN, C. J.—The *decision* of the justices is appealed against, not the justices themselves. CROMPTON, J.—It would be curious if the Judges of every *911] Court whose *decision is appealed against should be looked on as parties to the appeal.]

Keane, in support of the rule.—The respondent was no party to the appeal, unless for the purpose of costs, but the order is not divisible, and must be affirmed or disallowed in toto. Here the justices are the real parties to the appeal, and as such are entitled to be heard on it. [He mentioned that in Middlesex there is a fund set apart for the payment of costs awarded against justices on appeals.] Sects. 1 and 2 of stat. 12 & 13 Vict. c. 45, only apply to notices of *appeal*, not to summary convictions. [CROMPTON, J.—There is this difficulty in your way. Purdey was the person who laid the complaint, and therefore the real prosecutor. Sect. 18 of stat. 11 & 12 Vict. c. 43, enacts that in all cases where there is a summary conviction the justices of the peace may in their discretion inflict the costs of the complainant on the party charged, and in case they dismiss the information or complaint they may award costs to the defendant to be paid by the prosecutor or complainant. Stat. 12 & 13 Vict. c. 45, s. 5, gives the same power to the Quarter Sessions as to the costs of an appeal.] Sects. 5 & 6 show that costs are only given to the person entitled to receive notice of appeal. [He also referred to sect. 7.] [COCKBURN, C. J.—The former statute is expressly referred to in sect. 5 of stat. 12 & 13 Vict. c. 45.] *Rex v. The Justices of Hants*, 1 B. & Ad. 654 (E. C. L. R. vol. 20), was a conviction under The General Turnpike Act, 3 G. 4, c. 126, s. 55, for taking too large a toll; there the informer was the person appealed against, and by that

statute, s. 141, the *informer was entitled to half the penalty. In *Reg. v. Smith*, 29 L. J. M. C. 217, also, the informer had an [*912 interest in the result.

COCKBURN, C. J.—This rule must be discharged. I take the ordinary course of practice at Quarter Sessions to be that an appeal against a conviction throws on the prosecution the necessity of making out the case, and if no one appears to discharge the office of respondent, it is the duty of the Court to give effect to the appeal, on a presumption that the non-appearance of the respondent to support the case shows that he was not prepared to maintain the conviction. There is nothing on the evidence before us to show that this case was not heard in a perfectly regular way. It was called on in its order; no one appeared to support the conviction, and judgment was given for the appellant. Then an order is made whereby the prosecutor is called on to pay the costs: that is objected to on the ground that stat. 5 G. 4, c. 83, s. 14, which gives a right of appeal in cases like the present, requires that the notice of appeal shall be given to the convicting justices; it is contended that under this enactment the justices, and not the prosecutor, are parties to the appeal. That is a question of considerable importance, inasmuch as the power to give costs which the Court of Quarter Sessions possesses on appeal is derived from stat. 12 & 13 Vict. c. 45, s. 5, which empowers that Court to award costs against the party against whom the appeal shall be decided. If therefore the justices are the informants, and the prosecutor is not the party against whom the appeal is decided, but the justices are the real parties, Mr. *Keane's* argument prevails.

*I think, both on what I consider the true construction of stat. 12 & 13 Vict. c. 45, s. 5, and also on authority, that, although [*918 by The Vagrant Act, 5 G. 4, c. 83, notice of appeal is directed to be given to the convicting justices, without any provision that it shall also be given to the prosecutor, the justices are not parties to the appeal, but the appellant on the one hand and the prosecutor on the other are the real parties.

This statute, as was pointed out by my brother Crompton during the argument, follows on a previous statute, 11 & 12 Vict. c. 43, relating to summary convictions. In sect. 18 of that statute a power is given on informations of this nature to the justices to give costs either against the party informing or the party informed against. By the present statute, 12 & 13 Vict. c. 45, s. 5, a power to give costs is vested in the Quarter Sessions on appeal. It certainly would be a strange thing if the justice below, before whom the case was originally decided, should have power to give costs between the parties, and then upon a decision on appeal against his decision (possibly awarding costs in favour of the party appealed against), the Quarter Sessions, who are the superior judges of the cause, should not have a similar power to that possessed by a justice sitting alone. I should therefore endeavour to give such a construction to the section before us as will bring the two statutes into harmony.

Besides, we have very high authority. The first is in this Court, *Rex v. The Justices of Hants*, 1 B. & Ad. 654 (E. C. L. R. 20), although not on quite the same state of facts. That was an information before justices of the peace against whose decision an appeal lay to the Quarter

*914] Sessions. The *statute there contained a provision, similar to that here, that notice of appeal should be given to the justices, without any provision that it should be given to the opposite party; but power was given to the Quarter Sessions on appeal, as here, to give costs to the successful party appealing or appealed against. Now, although it is true that there the informer had a pecuniary interest in the result, the decision of this Court did not turn on that, but went to the question before us, viz., whether the justices or the person who laid the information were to be considered respondents on the appeal. And it was determined in a considered judgment, without any reference to the circumstances of the informer having a pecuniary interest in the result, that they were not. Lord Tenterden says, p. 659, "It would be a great anomaly to cause a justice, who acts bonâ fide in the discharge of his judicial duty, to pay costs. The question is, what is the meaning of the words, '*the party appealed against*'? The party appealing here is manifestly the party convicted; and if that be so, the informer is the only person who can satisfy the words '*party appealed against*.'" Such is the deliberate decision of Lord Tenterden. But then the question arose on this very statute before Hill, J., in *Reg. v. Smith*, 29 L. J. M. C. 217; who, considering the matter, came to the conclusion that the true construction of this 5th section of stat. 12 & 13 Vict. c. 45, and its application to The Vagrant Act, 5 G. 4, c. 83, s. 14, fall under the same interpretation as that adopted by Lord Tenterden in this Court under The Turnpike Act, 3 G. 4, c. 126. No judge ever sat in Westminster Hall for whom I and the whole profession entertain a more profound regard than Mr. Justice Hill. *All this is great

*915] authority to support the view which the Court is inclined to come to independently of those decisions.

My brother CROMPTON, before he left the Court, (a) desired me to say he concurs in the judgment just given.

MELLOR, J., concurred.

Rule discharged.

(a) Crompton, J., left the Court before the close of the argument.

Ex parte DE FIVAS. Nov. 4.

[Reported, 4 B. & S. 992 (E. C. L. R. vol. 116.)]

KEYES v. ELKINS. Nov. 18.

[Reported, ante, p. 240.]

END OF MICHAELMAS TERM.

MICHAELMAS VACATION, 28 VICT. 1864..

THOMAS, Appellant, JONES, Respondent. Nov. 29.

Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109, ss. 4, 11.—“Fixed engine.”

The Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109, s. 11, enacts, “No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters;” “and for the purposes of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine.” Three nets, six yards in length and one yard sixteen inches in depth, were set twelve yards apart, and extended to near the middle of a river; they were fixed at one end to a large stone on the bank, and at the other end of the net were kept up by corks with lead to keep them down; the net gave way as soon as a salmon touched it, and the fish, being entangled in it, died:—Held, not a fixed engine within that section.

CASE stated under stat. 20 and 21 Vict. c. 43.

At a Petty Sessions holden at Cardigan, on the 26th July, 1864, an information preferred by the respondent against the appellant under sect. 11 of The Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109, charging that the appellant used certain fixed engines, to wit, certain nets temporarily fixed to the soil, for the purpose of catching salmon in a part of the tidal waters of the river Tivy (such part comprising about three miles of the river, the town of Cardigan and its bridge being situate at the end next the sea of such part, the village of Llechryd and its bridge being situate at the other end, and the town of Kilgerran being situate on the south bank of the river between those two places, the river Tivy forming the boundary between the counties of Cardigan and Pembroke), was heard.

The defendant was seen setting three nets on the *Cardigan- [*917 shire side of the Tivy for catching salmon. The nets were six yards in length, and one yard sixteen inches in depth: they were about twelve yards apart, and extended to near the middle of the river, and were fixed to a large stone at one end on the bank, and at the other end of the net they were kept up by corks, with lead to keep them down in the river. The river was three or four feet deep. It did not appear whether the nets reached the bottom. When a salmon touched the net it gave way and gathered together, and the salmon got entangled, was rolled up like a rabbit in a net, and died. The nets were always placed in quiet water, and not in a current. It did not appear whether such a net would catch salmon without a stone; but it required a weight to hold the net and keep it extended.

It was contended, on the part of the appellant, that the nets were not fixed engines as contemplated by the 11th section of The Salmon Fishery Act, 1861, and that, if they were so, the use of them by the appellant was a mode of fishing lawfully exercised by him at the time of the passing of the Act by virtue of immemorial usage, of which some evidence was given; and therefore not affected by that section.

The justices being of opinion that the nets in question were fixed engines within the meaning of sect. 11, and that the evidence given on the

part of the appellant had not established that the nets were lawfully used by him by virtue of immemorial usage, convicted the appellant.

The Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109, sect. 11, enacts: "No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; . . . and for the purposes of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a *fixed engine, *918] but this section shall not affect any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage."

By sect. 4 (Interpretation Clause), "'Fixed engine' shall include stake nets, bag nets, putts, putchers, and all fixed implements or engines for catching or facilitating the catching of fish."

Keane (*J. W. Bowen* with him) appeared for the appellant; but the Court called upon

Giffard for the respondent.—The object of sect. 11 of stat. 24 & 25 Vict. c. 109, was to prevent the use of engines which remain fixed to the soil, even though temporarily. These nets are fastened to a stone on the bank of the river, and remain fixed by night and by day without any person being present to work them. A net secured by anchors is prohibited, and the stone to which these nets are fastened acts as an anchor. [CROMPTON, J.—Each net is intended to give way as soon as one salmon strikes it, and then it offers no further interruption to the passage of other fish; though no doubt they may be abused so as to bring them within the mischief contemplated by sect. 11. The stone at the end of the net is nothing like an anchor. MELLOR, J.—On the facts stated, I cannot see how this net is fixed to the soil.] Stat. 2 H. 6, c. 15, which is the earliest statute in *pari materiâ*, points to the distinction between a net which, by being fixed, catches fish without human agency, and other modes of fishing in which human labour is immediately employed: it ordains, "that the standing of nets and engines called trinks, and all other *919] nets, which be and were wont to be fastened and hanged *continually day and night, by a certain time in the year, to great posts, boats, and anchors, overthwart the river of Thames, and other rivers of the realm, which standing is a cause of as great and more destruction of the brood and fry of fish, and disturbance of the common passage of vessels, as be the wears, kydeles, or any other engines be wholly defended for ever." If this practice is legal, the whole of an estuary might have nets fastened as these are, and stretched across it so as to block it up.

CROMPTON, J.—It is impossible to say that a net moored at one end of it to a great weight, but so that part of the apparatus gives way when a fish comes to it, is a fixed engine within stat. 24 & 25 Vict. c. 109, s. 11. The weight used here partly for the purpose of keeping the net extended is like the leads in the case of an ordinary net worked by hand; and as to the leads of these nets, is not even found that they touch the ground. Then, if one of them is not a fixed engine, three of them in a line would not be such. This is not like a weir erected permanently across a river which prevents the fish passing up it. Indeed it is plain that more mischief might be done in scaring or capturing fish by nets being drawn down the river between boats in rapid succession, which is not prohibited by the Act, than by these nets, each of which

only avails for the capture of a single fish at a time. This is a mixed question of law and fact, and therefore we are not concluded by the finding of the justices, inasmuch as they have shown us evidence from which we see that such nets as these are not fixed engines.

MELLOR and SHEE, JJ., concurred.

Conviction quashed.

***DAWSON, Appellant, The Surveyor of Highways for the Parish of WILLOUGHBY WITH SLOOTHBY, Respondents. Dec. 13. [*920**

Highway.—Repair.—Hamlet.—Indictment.

The parish of A. contains several hamlets, all included in the poor-rate for the parish, with one set of overseers. M., one of these hamlets adjoining the parish of B., had, so far as living memory extends, been assessed to the property and income tax, land tax and assessed taxes as part of B. The occupiers of land in M. have at various times held the offices of guardian of the poor, overseer, churchwarden and dike-reeve for A., and had never held similar offices in B. M. had time out of mind paid poor-rates, church-rates, sewer-rates and tithes to A. So far as living memory and evidence of reputation went, the occupiers of lands in M. had always been assessed and had contributed to the highway-rates of B., and the highways in M. had always been repaired by B. until 1841, when, by private arrangement with the surveyors of the highways of B., the lands in M. ceased to be assessed in that parish; and the highways in M. have still been repaired by the occupiers of lands in M. without any rate, the surveyors of the highways of B. expressly reserving to themselves the right of assessing the lands in M. to the highway-rates at any future time. Held,

1. That M. was assessable to the highway-rate for A., there not being sufficient evidence to warrant the conclusion that M. was a hamlet repairing its highways separately.

2. That B. and M. could not be jointly indicted for the non-repair of highways in M.

NOTICE of appeal having been given to the Lincolnshire Quarter Sessions against a highway-rate, for the parish of Willoughby with Sloothby, in which the appellant was rated as occupier of premises in the Hamlet of Mawthorpe, the following special case was stated under stat. 12 & 13 Vict. c. 45, s. 11.

The parish of Willoughby with Sloothby contains about 6000 acres of land, and also several hamlets. All the hamlets, including that of Mawthorpe, are included in the poor-rate for the parish of Willoughby with Sloothby, and since the passing of stat. 43 El. c. 2, only one set of overseers of the poor has been appointed for Willoughby with Sloothby to maintain the whole of the poor *whether resident in one part of the parish or another. The hamlet of Mawthorpe contains the appellant and three other occupiers, including The East Lincolnshire Railway Company, who became the purchasers under the powers of their Act, about eighteen years ago, of lands in the parish of Willoughby with Sloothby and in the hamlet of Mawthorpe traversed by their line. [*921

Neither the appellant nor the other occupiers, excepting the railway Company, have ever been assessed to or paid any highway-rates in respect of their lands situate in Mawthorpe to the parish of Willoughby with Sloothby, nor has the parish of Willoughby with Sloothby at any time repaired or contributed to the repair of any part of the highway in the hamlet of Mawthorpe; but the railway Company has always for the last eighteen years been assessed to and regularly paid their highway-

rate in respect of the lands in Mawthorpe occupied as aforesaid to the surveyors of highways of the parish of Willoughby with Sloothby.

The hamlet of Mawthorpe adjoins the parish of Well, and has, so far as living memory extends, been assessed to the property and income tax, land tax and assessed taxes, as part of the parish of Well and for the appointment of constables has also been treated as part of that parish, under the designation of Well with Mawthorpe. From the year 1828 to 1841 it appears from living testimony, and previously by evidence of reputation, that highway rates were assessed upon the occupiers of lands in the hamlet of Mawthorpe by the surveyors of the highways of Well jointly with the lands in the parish of Well, and that the highways in the hamlet of Mawthorpe were repaired by the surveyors out of those *922] rates jointly with the highways in the parish of Well, *and without distinction. For the purpose as is alleged of evading the payment of fees due to the magistrates' clerk, these highway-rates were not submitted to the magistrates for allowance; but it does not appear that the occupiers in Mawthorpe ever objected to this informality: they always paid the sums assessed upon them in those rates, and the surveyors' accounts were duly submitted to and allowed by the magistrates. Since the year 1841 the lands in Mawthorpe, by private arrangement with the surveyors of the highways of Well, ceased to be assessed in that parish, and the highways within the hamlet have, ever since that time, been repaired by the occupiers of lands in the hamlet (except the railway Company) amongst themselves without any rate or assessment whatever. In consenting to the above arrangement, the surveyors of the highways of Well expressly reserved to themselves the right of assessing the lands in Mawthorpe to the highway rates at any future time, if they should think proper.

The occupiers of land in Mawthorpe have held at various times the offices of guardian of the poor, overseer, churchwarden, constable, and dike-reeve for the parish of Willoughby with Sloothby, and have never held similar offices in the parish of Well. The hamlet of Mawthorpe has time out of mind paid poor-rates, church-rates, sewer-rates and tithes, but not highway-rates, to the parish of Willoughby with Sloothby.

The question for the opinion of the Court was, Whether the hamlet of Mawthorpe was properly assessed to the highway-rate for the parish of Willoughby with Sloothby. It was agreed that the Court should have the power to draw inferences and conclusions from the facts which a jury upon the trial of a civil action would have.

*923] *The case was argued in this Term, November 14th, before COCKBURN, C. J., CROMPTON, MELLOR and SHEE, JJ.

Boden, for the respondents.—The hamlet of Mawthorpe has been for all parochial purposes, except the highway-rates, part of the parish of Willoughby with Sloothby, and has not been associated for parochial purposes with the parish of Well; with respect to the constable there are statements in the case both ways, but he is not a parish officer appointed at the court leet. The parish of Willoughby with Sloothby is in the first instance indictable for the non-repair of the highways in the hamlet of Mawthorpe, and to such an indictment could not plead that the parish of Well was liable: *Rex v. The Inhabitants of St. Giles, Cambridge*, 5 M. & S. 260, 265, per Lord Ellenborough; *Rex v. The Inhabitants of Ecclefield*, 1 B. & A. 348, 360, 361 (E. C. L. R. vol.

15). [COCKBURN, C. J.—Suppose the parish of Well was indicted for the non-repair of the highways in Mawthorpe.] It might demur to the indictment, or would have an answer on the facts, the connection between it and Mawthorpe having been dissolved.

Mellish, for the appellant.—First. The hamlet of Mawthorpe, for the purposes of the poor-rate and church-rate, is in the parish of Willoughby with Sloothby, but, for the purpose of the repairs of the highways, may be united with the parish of Well. It is not illegal that there should be different boundaries of parts of a parish for different purposes. *Rex v. The Inhabitants of St. Giles, Cambridge*, was decided on the ground that there no consideration was shown for the liability of *the [*924 inhabitants of a certain parish to repair the highways in alienâ parochiâ, not that such a liability could not legally exist. [CROMPTON, J.—Could an indictment for the non-repair of the highways in Mawthorpe be preferred against the parish of Well and the hamlet of Mawthorpe jointly? The indictment must be against a body known to and recognised by the law.] Such an indictment would not impose on the inhabitants of Well a burden without consideration for it. [COCKBURN, C. J.—The only consideration here was, that the rates of the hamlet of Mawthorpe should go towards the repairs of the highways in Well, but that is not compulsory on Mawthorpe, and therefore there is no binding consideration.] [He cited stats. 5 & 6 W. 4, c. 50, s. 33, and The Union Assessment Committee Act, 1862, 25 & 26 Vict. c. 103, s. 36.]

Secondly. The proper inference from the facts is, that Mawthorpe is a hamlet maintaining its own highways independently of Willoughby with Sloothby: *Freeman v. Read*, 4 B. & S. 174 (E. C. L. R. vol. 116). Mawthorpe has never contributed to the highway-rates for the parish of Willoughby with Sloothby, and that parish has never repaired the highways in the hamlet. [CROMPTON, J.—Having to draw inferences as jurymen, we are disposed to follow the advice we give to them not to disturb a state of things long acted upon if it can have a legal origin. The difficulty is that the parish of Willoughby with Sloothby never interfered in the hamlet of Mawthorpe.]

Boden, in reply.—[COCKBURN, C. J.—The earliest evidence is that the parish of Well and hamlet of Mawthorpe jointly contributed to the repair of the highways in the district consisting of that parish and hamlet; *can that have had a legal origin unless Mawthorpe [*925 was once a hamlet maintaining its own highways?] That was an irregular arrangement between Mawthorpe and Well, to which Willoughby with Sloothby was no party; and it was stopped in 1841, since which time, by private arrangement between the three occupiers in Mawthorpe, exclusive of the railway Company, and the surveyors of the highways of Well, the highways in Mawthorpe have been maintained by the hamlet without a rate. [COCKBURN, C. J.—We are with you on the proposition that Well and Mawthorpe could not be jointly indicted.]

Cur. adv. vult.

COCKBURN, C. J., delivered the judgment of the Court.

In this case we are of opinion that our judgment should be for the respondents, on the ground that the hamlet of Mawthorpe is properly assessable to the highway-rate for the parish of Willoughby with Sloothby.

The hamlet of Mawthorpe forming part of the parish of Willoughby

with Sloothby, it follows that, *prima facie*, Mawthorpe must be taken to be liable to be assessed to the highway-rates of the parish. It lies upon the hamlet, in order to avoid this liability, to establish some special ground of exemption. The only ground of exemption put forward on the part of the appellant and the occupiers of land within the hamlet was, that the latter, though part of the parish of Willoughby with Sloothby, was, as to the repair of the highways and as to the rates made for that purpose, united to the adjoining parish of Well. But it appeared to us that, giving full effect to the statement that so far as living memory and evidence of reputation went Mawthorpe had always been *926] assessed and had contributed to the highway-rates of *Well, and the highways within the hamlet had always been repaired by the latter parish, yet these facts could not alter the liability of Mawthorpe to be assessed to the parish of which it forms a part. No such thing is known to the law as part of one parish being united to another parish for the purpose of the repair of the highways, although it may in some cases happen that a parish may be bound to repair the highways in a part of another parish if a good and continuing consideration for such an obligation can be shown. Here, however, no such consideration on the part of the parish of Willoughby with Sloothby appears, and it follows, on the authority of *Rex v. The Inhabitants of St. Giles, Cambridge*, 5 M. & S. 260, 265, that, if an indictment for the non-repair of a highway in the hamlet of Mawthorpe were preferred against the parish of Willoughby with Sloothby, the latter parish could not set up the liability of Wells as a defence. It may well be that the long-continued practice of treating the hamlet as united with Well for highway purposes arose from general convenience, and was matter of arrangement between the two parishes and the hamlet. But such arrangement would be binding no longer than a common sense of convenience made all parties concur in continuing it. All parties would be remitted to their original rights and liabilities so soon as either of them thought proper to put an end to it.

While however, for these reasons, we were satisfied that the ground taken by the appellant was untenable, the fact that the parish of Willoughby with Sloothby had never sought to assess Mawthorpe to the highway-rates of the parish, and from a remote period had allowed the *927] hamlet to be assessed to the highway-rates of Well, *appeared to us so striking, that it occurred to us that possibly an inference should be drawn from all the facts that Mawthorpe, though forming part of the parish of Willoughby with Sloothby, had originally been a hamlet repairing its own highways, and must be taken to have entered into a voluntary arrangement with Well, which under such circumstances it would of course have been competent for it to do, so long as both parties were agreed, that the two should be united for the repair of the highways. In this case, although the arrangement between Mawthorpe and Well would not have been binding in law, yet Mawthorpe, as having the right to repair its own highways, would not have been liable to be assessed to the highway-rate of the parish. Upon consideration, however, we think that the facts are not sufficiently cogent to warrant us in arriving at this conclusion. If indeed the hamlet of Mawthorpe had always repaired its own highways, the case of *Freeman v. Read*, 4 B. & S. 174 (E. C. L. R. vol. 116), is an authority to show that the proper inference

is that it was a hamlet repairing its highways separately from the parish of which it forms a part. But it appears that, till a very recent period, Mawthorpe has for highway purposes been treated as united with Well, and there is no trace (except as matter of inference) that Mawthorpe has ever until late years, and then only by arrangement with Well, maintained its own highways. And, indeed, as has been before observed, the case put forward by the appellants is, not that Mawthorpe is a hamlet repairing its own highways, but that it is part of the parish of Well for that purpose.

We think, therefore, that the proper inference to be drawn from the facts is that the present state of things *originated in an arrangement made at some remote period between the parishes. And as [*928 such an arrangement, being founded on no consideration beyond that of convenience, would not be binding longer than it was acquiesced in by all parties, we are of opinion that the parish of Willoughby with Sloothby is entitled to insist upon its right to treat the hamlet as part of the parish for the repair of the highways, and to assess it accordingly.

Our judgment will therefore be for the respondent.

Judgment for the respondent.

The GREAT WESTERN Railway Company, Appellants, BAILIE,
Respondent. Nov. 28.

5 & 6 W. 4, c. 63, s. 28.—*Incorrect weighing-machine.*

A weighing-machine which has become out of order so as to weigh untruly is an incorrect weighing-machine within stat. 5 & 6 W. 4, c. 63, s. 28, although by making an allowance for the error the weight of articles could be ascertained truly by it: *aliter*, where a machine from its construction requires to be adjusted before it can be used at all.

CASE stated under 20 & 21 Vict. c. 43.

At a special Sessions holden for the division of Brackley in the county of Northampton, a complaint was preferred by the respondent, being the inspector of weights and measures for the division, against the appellants, under stat. 5 & 6 W. 4, c. 63, s. 28, charging that they did, on, &c., at, &c., unlawfully have in their possession at their station there situate, and whereat goods were weighed for conveyance or carriage, a certain weighing-machine, which was then found by the respondent to be incorrect and unjust.

*929] *On this information the appellants were convicted and fined, subject to the following case.

The machine in question was that in use on the platform at Aynhoe Station for weighing parcels and passengers' luggage, all of which were weighed thereby. 6d. was the lowest price charged, and, for example, from Aynhoe to London for 14 lbs. was 10d., with an increase of 3d. for weights above 14 lbs. and under 21 lbs. The machine worked by a spring, and had a dial plate and index finger, with figures from zero to 560 lbs., by which the weight was ascertained. The machine had been injured and out of order for a fortnight before the day of complaint, and the index stood at 4 lbs. instead of zero, whereby, unless the 4 lbs. were allowed for, there would be a loss of that weight to the customer

or passenger in every case; but it was asserted by the station master that this allowance had been directed to be made by the porter who was in the habit of weighing the goods. If, however, a porter who was not aware of such orders and did not notice the defect were to weigh the goods, the result would be wrong. The station master proved that he did not adjust or rectify the machine to remedy the defect, and said that it could not be so rectified at the station, and that he had no means of doing it, but that the machines were inspected by the manufacturer every three months. The manufacturer who contracted with the Company was to inspect the machines and keep them in order, and to attend at any time when he had notice that a machine was out of order. The manufacturer was called, and admitted the machine was out of order, and said it could be adjusted by means of a pin, which method he explained. No notice to the manufacturer to adjust *the machine
*930] had been given until after the complaint had been made by the respondent.

The appellants contended that it was the duty of the respondent, before proceeding to examine the machine, to have taken steps to adjust it in the method spoken of, or at any rate to start from the weight of 4 lbs. indicated by the finger and deduct such amount from the apparent weight, and that the machine with such precautions was not incorrect or otherwise unjust within the meaning of the statute.

The respondent contended that the facts justified a conviction, the machine being admittedly incorrect and, without the allowance being made in each case, unjust, and that the argument of the appellants might be used in support of an ordinary scale ascertained to be faulty and the same allowance made; or, in the case of a weight proved to be light, and which the weigher corrected by allowing the deficiency. Also that upon the facts no rectification could be effected by the persons who were using the machine for the purpose of weighing, or by the respondent at his visit, and that for all purposes the machine was in gear and fit to be used but for the 4 lbs. shown against the customer, which required mental correction.

The question for the opinion of the Court was, Whether the appellants were liable to be convicted under the terms of the statute.

The case was argued on the 26th and 28th November, and judgment given on the latter day.

Cave, for the respondent.—Stat. 5 & 6 W. 4, c. 63, s. 28, enacts, "It shall be lawful for every justice of the peace of any county, &c.,
*931] or of any city or town, &c., or for *any inspector authorized in writing under the hand of any justice of the peace, &c., at all seasonable times to enter any shop, store, warehouse, stall, yard, or place whatsoever within his jurisdiction, wherein goods shall be exposed or kept for sale, or shall be weighed for conveyance or carriage, and there to examine all weights, measures, steelyards, or other weighing-machines, and to compare and try the same with the copies of the imperial standard weights and measures required or authorized to be provided under this Act; and if upon such examination it shall appear that the said weights or measures are light or otherwise unjust, the same shall be liable to be seized and forfeited; and the person or persons in whose possession the same shall be found shall, on conviction, forfeit a sum not exceeding 5*l.*; and any person who shall have in his or her

possession a steelyard or other weighing-machine which shall on such examination be found incorrect or otherwise unjust, or who shall neglect or refuse to produce for such examination, when thereto required, all weights, measures, steelyards, or other weighing-machines which shall be in his or her possession, or shall otherwise obstruct or hinder such examination, shall be liable to a like penalty." The machine kept by the appellants for weighing goods was inaccurate, so that the person who used it had to resort to a mental process to correct the inaccuracy. The London and North Western Railway Company, appellants, Richards, respondent, 2 B. & S. 326 (E. C. L. R. vol. 110), may be relied on, but there a mere adjustment before the machine was used was all that was required.

Hayes, Serjt. (*Digby* with him), for the appellants.—*The [*932 object of the section in question was the protection of the customers at retail shops by securing the supervision of those shops by authority, and rendering penal the bare possession on the part of their keepers of any weights or measures that are "light or otherwise unjust." [CROMPTON, J.—The subsequent part of the section is that on which this case depends, and it says "incorrect or otherwise unjust."] "Incorrect" and "unjust" are there used as synonymous. No fraud was contemplated by the appellants. This machine is like a watch the error of which is known, and therefore cannot mislead any one. It cannot be the law that the owner of a weight or measure becomes liable to a penalty the moment it gets out of order, even by accident. [MELLOR, J.—I should be unwilling to say it is, but the Company continued to use this machine for some time after it had got out of order.] The question is not raised whether they kept it in that state an unreasonable time. These machines are fixed, and it would be absurd to expect the Company to send them away to a manufacturer to be mended every time they become out of order. The London and North Western Railway Company, appellants, Richards, respondent, 2 B. & S. 326 (E. C. L. R. vol. 110), is an authority in favour of the appellants. There a machine which from its construction was liable to variation from atmospheric and other causes, and required to be adjusted before it was used, was examined by the inspector before it had been adjusted, and held not incorrect within the meaning of this section.

Cave was not called on to reply.

*CROMPTON, J.—This conviction must be affirmed. It is on a branch of sect. 28 of stat. 5 & 6 W. 4, c. 68, which imposes a [*938 penalty for having in possession any weighing-machine "incorrect or otherwise unjust." In order to come within this the act done need not be morally wrong; it is sufficient that the party keeps a weighing-machine which does not weigh correctly.

The analogy of the watch the error of which is known, used by my brother *Hayes*, is in reality against him: if a stage coach were required to have a watch, it would be incorrect if it had one an hour wrong in the time. The machine in this case was in working order, but it wrongly showed 4 lbs. weight against the customer. Now the very object of the enactment was to prevent persons having in their possession machines which weigh wrong and thereby afford the opportunity of cheating, either by themselves or through the fraud or carelessness of their underlings or servants.

It is argued that, although this machine is incorrect, it can be made

to weigh right by a certain process. But the same might be said of every pair of scales used in weighing cheese that falsely shows 2 lbs. weight against the customer. If the seller is thoroughly honest, he puts a sufficient weight into the opposite scale; still, if the inspector came in and challenged the scales as incorrect, it would be no answer to say, "I always do this or tell my servant to do it."

This case is entirely different from *The London and North Western Railway Company, appellants, Richards, respondent*, 2 B. & S. 326 (E. C. L. R. vol. 110). I am there reported as saying, p. 334, "Before the machine is used it must be adjusted, and this adjustment was not made *934] by the inspector before *his examination; and the machine was found to be incorrect because it was not adjusted. It cannot therefore be said to be incorrect for the purpose of weighing because it is found in a state in which it would not be used for weighing." The distinction between that case and the present, is, that there no man ought to have used the weighing-machine without adjusting, and in practice that was done every day before using it; in the same way as with astronomical instruments before using them. I further say in that case, "The great beauty of the machine is that, when an inaccuracy may or rather must constantly occur, the machine has in itself an appliance by which that inaccuracy may be remedied. Unless that appliance, which is an integral part of the machine, is used, the instrument cannot be said to be properly tested, any more than you could say that a telescope gave an improper result if you did not draw it out so as to get the right focal distance before using it." That is not so here. An injury had happened to this machine a fortnight before, it was no part of the original design of the machine that there should be an adjustment of it from time to time, and consequently it was a machine the using which was incorrect after that accident. It was not an injury which might be remedied directly, but the Company went on in the course of using it, and it might be used by some of their servants who did not understand it.

MELLOR, J.—My brother Crompton has clearly distinguished this case from *The North Western Railway Company, appellants, Richards, respondent*, 2 B. & S. 326 (E. C. L. R. vol. 110). I cannot help think- *935] ing, notwithstanding the ingenious *argument of my brother *Hayes*, that it is no matter whether the person using the weights and measures is a small shopkeeper or a great Company, he is equally bound to have them correct in either case. Now this machine had been used for a fortnight at least in this state. No one supposes that The Great Western Railway Company meant it to be used for the purpose of fraud; but they allowed it to be used, and that is sufficient to bring them within the statute.

SHEE, J., concurred.

Judgment for the respondent.

REEVE, Appellant, WOOD, Respondent. Nov. 28.

[Reported ante, p. 364.]

IN THE EXCHEQUER CHAMBER.

TIPPING *v.* The ST. HELEN'S Smelting Company (Limited).
Nov. 26.

[Reported 4 B. & S. 616 (E. C. L. R. vol. 116).]

*CATOR *v.* The Board of Works for the LEWISHAM Dis- [*936
trict. Nov. 28.

[Reported ante, p. 115, 127.]

The QUEEN, on the Prosecution of the Burial Board of AMER-
SHAM *v.* The Overseers of COLESHILL. Nov. 29.

[Reported 4 B. & S. 667 (E. C. L. R. vol. 116).]

The QUEEN *v.* The Local Board of Health of The Borough of
GODMANCHESTER. [Feb. 3, 1866.]

*Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 43.—Sewer.—Drain or watercourse
set out under Enclosure Acts.—Mandamus.*

A brook, the water of which was supplied by the drainage, natural and artificial, of a considerable area of cultivated soil belonging to private individuals, received at the lower end of it, near a river into which it flowed, the drains of two or three inhabited houses. By The General Enclosure Act, 41 G. 3, c. 109, s. 10, the Commissioners are to set out and appoint private roads, . . . drains, watercourses, &c., and the same shall be made and supported and kept in repair at the expense of the owners of the lands, directed to be divided and enclosed, in such proportions as the Commissioners shall direct. In 1809, Commissioners acting under a local Enclosure Act by their award set out this brook, among others, as a "public drain or watercourse," and directed that all such drains should be made, scoured and kept in repair at the expense of the proprietors of the lands, divided and enclosed by virtue of the Act, in equal proportions. They also cleared out the channel of the brook, and in various places widened and deepened it to render it more efficient as a means of draining a portion of the tract of land which was subject to the provisions of their Act. Afterwards two of the landowners, for their own convenience, altered the course of the stream, by cutting artificial channels for short distances. The brook is within the limits of the Local Board of G., and it having become a nuisance, a mandamus issued to them to clear, cleanse, empty and keep it.

1. Held, affirming the judgment of the Court of Queen's Bench, that it was not a "sewer" within The Public Health Act, 1848, 11 and 12 Vict. c. 63, and therefore was not vested in the Local Board of Health under sect. 43.

2. *Quære*, whether, supposing the brook to be a sewer, it was within the exception in that section of "sewers made and used for the purpose of draining, preserving, or improving land under any local Act of Parliament?"

3. Held, that a mandamus could not go to the Local Board of Health under sect. 46, to clear, cleanse, and empty and keep it.

ERROR having been brought upon the judgment given for the defendants in the Court below, see ante, p. 886, the case was argued before

ERLE, C. J., WILLES, KEATING and SMITH, JJ., and POLLOCK, C. B., and PIGOTT, B.

Keane (*Douglas Brown* with him), for the prosecutor.—First. *Callis*, p. 80, edit. by Broderip, p. 99, after referring to 20 H. 6, f. 1, where an action of waste was brought against tenant by the curtesy for suffering a sewer in part of the grounds to be unrepaired, by reason whereof his grounds in L., which the defendant held by the curtesy of England, were surrounded, that is drowned; says, “so that by this book it is made manifest that the sewer is a fresh-water trench compressed in on both sides with a bank, and is a small current or little river.” He adds “Hollingshead in his Chronicle termeth the Fleet Dike in London a sewer; and I am of opinion, that it is a diminutive of a river.” Therefore, the interior of the country as well as the sea-coast is within the jurisdiction of the Commissioners of sewers. [WILLES, J., referred to stat. 3 Jac. 1, c. 14, and Herne’s Reading upon the Statute of Sewers, *938] 23 H. 8, c. 5.(a)] In *Coulton v. Ambler*, 13 M. & W. 403, the *Eau Brink Cut*, for improving the drainage of lands adjoining the river Ouse, was held not to be a “public or parish drain” within a Turnpike Act, 4 G. 4, c. lv., s. 35, in which case the trustees had the right to make use of any public or parish drains leading to or near the roads; but that was on the ground that it was navigable. [He also cited *Stracey v. Nelson*, 12 M. & W. 535.] The area of this district under the Godmanchester Local Board including agricultural lands was constituted under stat. 11 & 12 Vict. c. 63.

Secondly. [He contended that Stonehill Brook was not within either of the exceptions in sect. 43 of stat. 11 & 12 Vict. c. 63, and cited, on the meaning of the word “profit,” *Reg. v. Whitmarsh*, 15 Q. B. 600 (E. C. L. R. vol. 69), *Bear v. Bromley*, 18 Q. B. 271 (E. C. L. R. vol. 83); also *Ostler v. Cooke*, in error, 18 Q. B. 831, 839.]

Thirdly. The state of Stonehill Brook being admitted to be a nuisance, a mandamus ought to go to the Local Board of Health to cleanse it.

Joseph Brown (*Metcalf* with him), for the defendants.—First. Stonehill Brook is an agricultural brook, not a “sewer.” In *Com. Dig. Sewers* (C 1), 5th ed., the jurisdiction of the Commissioners of sewers is said to extend to “the arms of the sea, creeks, havens and ports;” *939] and it is added by one of the editors, “The Commission of sewers extends only to navigable streams, unless within two miles of London. Vide stat. 3 Jac. 1, c. 14, and 2 Bl. R. 717.” And, “Yet if the sewer communicate with a navigable stream, or with the sea above the point where the tide ebbs and flows, if it be useful for navigation, and if the place over which the jurisdiction is exercised be likely to be benefited, or be so in fact, the Commissioners have jurisdiction. 2 T. R. 358.” [WILLES, J.—The word “streams” occurs in stat. 23 H. 8, c. 5,

(a) “The commission upon this statute extends (not onely) to maritime parts, but to the reforming all nusances in any part of the realme of England, as well of rivers navigable as not navigable, to streames, &c., but alwayes with this caution, that the proceeding tends to a publique good and not to a private benefit; and for this reason there ought not to be any impedement to navigation, or to a river which by industry may be made navigable, or for the overflowing of land: so of rivers newly made for navigation, or drayning for a countrey, as in Lincolneshire: in these cases it concerns the generall benefit of the subject, otherwise of private waters, and so is it of the King’s highway, which is onely within this statute, and not for the wayes for private use among particular persons.” p. 2. “The new river of Ware is not within this statute, because it tends neither to navigation nor to dreyning, but by the statute of the 5” [3] “Jac. there is a speciall provision for it.” p. 5.

s. 2 (2).] Whatever may be the meaning of the words "sewer" and "drain" in general, they have a restricted sense in stat. 11 & 12 Vict. c. 63, which according to the preamble is intend to apply to the sewerage and drainage of "towns and populous places." The interpretation clause, sect. 2, gives to the word "drain" the meaning of a drain for the sewage of one house, and to the word "sewer" the meaning of a drain for the sewage of a collection of houses; it does not mention "stream" or "watercourse," though those words occur in sect. 145 for protecting persons interested in them. [ERLE, C. J.—That section is repealed by sect. 68 of The Local Government Act, 1858, 21 & 22 Vict. c. 98, which, re-enacting it in sub-section (1), omits those general words.] If this is a sewer vested in the Local Board no landowner could drain into it without the written consent of the Board; 11 & 12 Vict. c. 63, s. 47. [WILLES, J., referred to *Cator v. The Lewisham Board of Works*, in error, ante, pp. 115, 127.]

Keane, in reply.

ERLE, C. J.—The judgment of the Court below must *be affirmed. We agree in the reasons which the Judges of that [*940 Court assigned for their judgment, and particularly in their reasons for holding that Stonehill Brook is not a sewer within The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 43. The definition of that word in the interpretation clause, sect. 2, is not precise; but it is to be construed with the preamble and the course of enactments in the statute; and we are all of opinion that this natural brook, draining fields and at the lower end of it receiving the sewage of two inhabited houses and so making its way into the river Ouse, is not a sewer within sect. 43.

Our judgment being for the defendants on the first point, it is not necessary to enter upon the second point urged for them that this brook, if a sewer, is within the second exception in sect. 43 of sewers "made and used for the purpose of draining, preserving, or improving land under any local Act of Parliament."

The argument of Mr. *Keane* on the third point weighed most with me, that this brook was in a state to be a nuisance and injurious to public health within sect. 58. But we cannot give judgment for the prosecutor under that section because it does not impose on the Local Board of Health the duty to remove the nuisance in the first instance, but requires them to give notice to the owner or occupier of the premises whereon the nuisance exists requiring him to remove it; and on his failure to comply with the notice they are bound to execute the necessary works and compel him to reimburse them. That is not within the scope of this mandamus.

The rest of the Court concurring,

Judgment affirmed.

*941] *CARR and Another v. The ROYAL EXCHANGE Assurance Corporation. Dec. 13.

CARR and Another v. Sir MOSES MONTEFIORE, Bart.

Marine Insurance.—Counts on policy and for money had and received.—Payment of money into Court.—Amount to be recovered.—Process of the Court.

The plaintiffs having declared on a policy of insurance with a count for money had and received, the defendants paid the amount of the premiums into Court on that count, pleading to the count on the policy so as to raise, amongst other defences, that of unseaworthiness. The plaintiffs took the money out of Court in satisfaction of the claim under the count for money had and received. At the trial the defence of unseaworthiness having been given up, a special case was stated for the opinion of this Court, which was afterwards taken into the Exchequer Chamber, and in both Courts it was held that the plaintiffs were entitled to recover as for an average loss. The amount of the average loss was referred to and ascertained by average-staters, but this not being done before the argument of the case, a nominal judgment for 3500*l.* was entered up for the purpose of taking the case into error. Held, that the plaintiffs were not entitled to enter judgment and take out execution for the entire amount of the average loss without giving credit to the defendants for the amount paid into Court and taken out by them.

THESE were actions in which the plaintiffs sought to recover on a policy of insurance in the ordinary form on ship and cargo. The pleadings were the same in both actions.

The first count of the declaration was on the policy, and there was also a common money count, in which the plaintiffs sought to recover a return of the premiums.

The defendants pleaded: to the first count, among other pleas, that the ship was at the time of her departure for the voyage unseaworthy; and on the money count paid into Court the amount of the premiums.

The plaintiffs took issue on the pleas to the first count, and took the money out of Court.

*942] *The ship and cargo became in fact, though not in law, a total loss for want of notice of abandonment. A commission issued to examine witnesses abroad, and after the return of it the defence of unseaworthiness was given up. On the trial of the issues in fact a verdict was found for the plaintiffs, leave being reserved to the defendants to move the Court on any points. A rule nisi was obtained accordingly to enter a nonsuit or reduce the damages on grounds therein stated, with liberty to state a special case. A case was accordingly stated and argued, and judgment given that the plaintiff was entitled to recover as for an average loss (see 5 B. & S. 408, 433). The amount of the average loss was referred to an arbitrator by agreement of reference in the usual terms, a nominal judgment being entered up for 2000*l.* and 1500*l.* costs, "for the purpose only of completing the judgment and enabling the defendants to bring error." The judgment of this Court was affirmed by the Exchequer Chamber. See 5 B. & S. 425, 438.

Before going into error the attorneys for the parties entered into another agreement, "that in case the plaintiffs shall be held to be entitled to recover as for a total or partial loss in this action on ship or cargo or either of them, it shall be referred to Mr. Davidson and Mr. Richards, the average-staters of London, or in case they differ to a third London average-stater to be named by them as umpire between

them, to fix the amount of such total or partial loss, as the case may be, and the verdict shall be entered for such amount accordingly not exceeding the amount of the liability under the policy."

The average-staters fixed the amount of the "loss of both ship and cargo at the sum of 2038*l.* 11*s.* 7*d.*"

*A summons was taken out by the plaintiffs to show cause why the verdict should not be entered and final judgment signed [*943 for 2123*l.* 10*s.* 3*d.*, being the amount of the sum fixed by the average-staters with interest. And it being discovered that in making their award they had only considered the amount of the loss, and that they would have deducted the amount paid into Court if they had thought that they were at liberty to do so, a cross-summons was taken out by the defendants to show cause why the plaintiffs should not be prohibited from signing judgment for any sum exceeding the sum awarded by the average-staters, less the amount paid into Court. Shee, J., referred the matter to the Court.

Watkin Williams obtained a rule in the first of these actions, calling upon the plaintiffs to show cause why the judgment roll should not be amended by entering the verdict for the sum awarded by the average-staters, less the premiums paid into Court.

Cohen obtained a similar rule in the second.

Both rules were argued in this Term, November 25th, before COCKBURN, C. J., CROMPTON and MELLOR, JJ.

Milward showed cause in both actions.—The plaintiffs were entitled to put both counts in their declaration—one to recover for the loss, the other for a return of the premiums if the ship was unseaworthy. The defendants had the choice of defending the action on the ground of the policy being void or on other grounds: they must determine which defence they would set up, *and having been beaten on the principal ground they have no right to ask to have the amount of the [*944 loss reduced by the premiums paid into Court. This was money paid under a writ, and therefore cannot be recovered back: *Marriott v. Hampton*, 7 T. R. 269, 2 Smith L. C. 356, 5th ed. [COCKBURN, C. J.—This is an application to the Court to mould its judgment.] It is a stronger case than an action to recover back money received on a consideration which has failed, because if the Court makes this rule absolute there is no appeal. After the money paid into Court was taken out, the action proceeded only on the count upon the policy. The agreement between the attorneys substituted the average-staters for the jury, and the verdict is to be entered for the amount fixed by them. Further, money paid into Court on a common count cannot be applied in part payment or reduction of a claim on a special count. [He was then stopped.]

Watkin Williams and *Cohen*, in support of the rules.—The declaration combines two inconsistent causes of action, and the plaintiffs are not entitled to recover on the count upon the policy and on the count for a return of the premiums. The two counts are not for duplicate or separate heads of claim, as in an action by a landlord for rent and dilapidations, but alternative claims, so that the plaintiff is entitled only to the one or the other. There is only one true state of things and only one claim which can be sustained. In *Churchill v. Day*, 3 Mann. & Ry. 71, 74, Lord Tenterden said money paid into Court must be applied to

the only sum recoverable on the counts on which it is paid in. It would
 *945] be dangerous to say that *if money is paid into Court upon one
 count, and in the declaration another count is found more accurately applicable to the plaintiff's cause of action, the effect of the payment should be defeated. And in *Early v. Bowman*, 1 B. & Ad. 889 (E. C. L. R. vol. 20), in an action on a bill of exchange with money counts, the defendant having pleaded to the bill, and on the money counts paid money into Court, it was held that he was entitled to the benefit of the money paid into Court. [CROMPTON, J.—The defendants could not have paid money into Court on the count upon the policy.] In the analogous case of a declaration with two counts, one for fraudulent representation and another for breach of agreement, on which money is paid into Court, the Judge at Nisi prius would direct the jury, in awarding damages, to take that money into account. Money paid into Court under a mistake may be restored to the defendant: *Colyer v. Selby*, cited in 2 Arch. Pr. by Chitty, 11th ed. 1356, note (q), per Parke, B., at Chambers, overruling the dictum of Buller, J., in *Malcolm v. Fullerton*, 2 T. R. 645, 648; *Webster v. Emery*, in error, 10 Exch. 901.

The ancient mode of paying money into Court was under a rule of Court, "That unless the plaintiff accepted of it, with costs, in discharge of the action, it shall be struck out of the declaration, and paid out of Court to the plaintiff or his attorney;" Tidd Pr. 619, 9th ed.; and that rule would be moulded to meet the justice of the case, so as to avoid the difficulty arising on the plea of payment of money into Court since the Reg. Gen. H. T. "General Rules and Regulations," 4 W. 4, r. 17 (see 5 B. & Ad. vi.) In *Gould v. Oliver*, 2 M. & Gr. 208 (E. C. L. R. vol. *946] 40), which *was after the new rules of pleading, there was a count on a charter-party for improperly loading a ship and a count to recover general average, which bear no more resemblance to each other than the counts in this declaration do: money was paid into Court on the second count, which the plaintiffs took out of Court in satisfaction of the damages alleged in that count: a verdict having been given for the plaintiffs on the first count for a less sum than was paid into Court on the second, one of the questions was whether at the trial the Judge ought to have allowed the second count, the plea thereon, and the replication, to be read as evidence on the part of the defendant of an admission by the plaintiff that the cargo had been properly stowed. In the course of the argument Tindal, C. J., and Bosanquet, J., p. 221, intimated that the plaintiffs could not recover upon two inconsistent counts, and Tindal, C. J., in delivering the judgment of the Court, said, p. 235, "The defendant, admitting the second claim, pays it into Court, which the plaintiffs take out, having no claim, in this view, beyond the amount paid in. But, in so doing, they do not abandon the claim which they have preferred in the first count of the declaration; and upon which issues remain to be tried. They would not, indeed, be permitted to retain the whole amount of loss under the first count, and the amount of general average under the second; but they are not to be deprived of their right to insist, that a total loss has been sustained by the misconduct of the defendant." [CROMPTON, J.—The plaintiffs may enter up judgment at their peril.] Here they ask the Court to amend the judgment, viz., the amount found by the average-staters, and the Court

will not allow it to be amended so as to enable the plaintiffs *to recover more than they are entitled to under the policy of insurance which is a contract of indemnity; as that would be an abuse of the process of the Court: *Cocker v. Tempest*, 7 M. & W. 502. [*947]

Milward, in continuation of his argument.—The agreement between the attorneys was that the verdict should be entered for the amount fixed by the average-staters. [COCKBURN, C. J.—It may be taken that the verdict ought to be entered as the Judge at Nisi prius would direct it to be entered.] The dicta in *Oliver v. Gould*, 2 M. & Gr. 208, 221, 235 (E. C. L. R. vol. 40), were not necessary for the decision of the case, and a venire de novo was awarded. The premiums are not paid into Court as part of the indemnity. Upon the pleadings the plaintiffs are entitled to recover and retain both amounts.

Cur. adv. vult.

CROMPTON, J., delivered the judgment of the Court.

In each of these cases, the plaintiffs having declared on a policy of insurance with a count for money had and received, the defendants paid the amount of the premium into Court on that count, pleading to the count on the policies so as to raise, amongst other defences, that of unseaworthiness. The plaintiffs took the money out of Court in satisfaction of the claim under the count for money had and received. At the trial, the defence of unseaworthiness having failed or having been abandoned, a special case was stated for the opinion of this Court, which was afterwards taken into the Exchequer Chamber, and in both Courts it was *held that the plaintiffs were entitled to recover as for an average loss. The amount of the average loss was referred to [*948] and ascertained by average-staters, but, this not being done before the argument of the case, a nominal judgment for 3500*l.* was entered up for the purpose of taking the case into error.

The plaintiffs are now to enter up their judgment and take out their execution for the amount to which they are entitled. And they claim to be entitled to enter their judgment and take out their execution for the entire amount of the average loss without giving credit to the defendants for the amount paid into Court and taken out by the plaintiffs. The defendants obtained rules nisi, in effect, to restrain the plaintiffs from taking judgment and execution for the entire amount of the loss without giving credit for the sums paid in respect of the premiums.

It is obvious that nothing could be more unjust than that the plaintiffs should recover back the premiums which they could only be entitled to on the ground that the risk under the policy did not attach, and also the whole amount of the loss to which they could only be entitled if the risk did attach. It is plain that what the plaintiffs were entitled to in the event which happened was the loss after deducting the premiums. It was said, however, on the part of the plaintiffs, that the state of the pleadings allowed them to perpetrate this injustice, and that the money which had been paid into Court and taken out in satisfaction could not in any way be treated as reducing the amount to which the plaintiffs were entitled in respect of their average loss. On the other hand it was contended that the deduction in *question was one which a jury ought on the trial to take into account in reduction of the [*949] damages. It was said that the jury, having ascertained the amount of the loss, have to inquire what is the damage to which the plaintiffs were

entitled, and that there are many cases in which, circumstances happening after the *prima facie* damage has occurred, are allowed to reduce the damages. Thus part payment after action brought has always been held to reduce the damages: so, in trover the return of the goods goes in reduction of damages: and in the case of an executor de son tort who has interfered with the estate and so converted it, if he has paid debts he is "recouped," as it is called, in damages.

It is unnecessary to decide this question in the present case, because we think that the Court has the power of preventing the plaintiffs from proceeding to carry out by its process such a piece of injustice as they are here contemplating. In *Gould v. Oliver*, 2 M. & Gr. 208 (E. C. L. R. vol. 40), where the plaintiffs obtained a verdict on a count inconsistent with that on which money was paid into Court, it was insisted that, by taking the money out of Court, the plaintiffs had estopped themselves from recovering on the inconsistent count. The Court held that such estoppel ought not to prevail, and that each count must be dealt with independently of the rest of the record; but Tindal, C. J., remarked, p. 235, that the plaintiffs would not be permitted to retain the whole amount of the loss under the first count and the amount of the general average under the second. This remark, though said not to be neces-

*950] sary to or part of the matter decided, *was strictly pertinent to the matter under the consideration of the Court, being an answer to an objection which might have arisen that, if there were not an estoppel, the plaintiffs, having got the money, could not be made to part with what they had taken out of Court, and that so they could recover it twice over. No, says the Chief Justice, the Court would not allow them to retain it and take the whole amount of the loss besides. Now, here, the plaintiffs would get, besides their indemnity from loss on the policy, the amount of the premiums: in other words, they would get back the price they had paid and the thing bargained for as well. We think they cannot be permitted to retain both. The expression of the Chief Justice seems to point to the power inherent in these Courts, by stay of proceedings or otherwise, to prevent the abuse of their process.

For these reasons we are of opinion that the defendants are entitled to the relief they pray for, and that the rules should be made absolute to prevent the plaintiffs from signing judgment or issuing execution for any larger amount in respect of damages than the balance of the average loss ascertained by the average-staters, after deducting the amount of the premiums paid into Court.

Rules accordingly, without costs.

- Rules absolute.

*951] *The QUEEN v. The WORKSOP Local Board of Health. [June 14, 1865.]

Board of Health.—11 & 12 Vict. c. 63, ss. 89, 98, 149.—*District-rate.*—*Seal of Board.*—*Estimate.*

1. The absence in the rate-book of the seal of the Local Board of Health and the signature of five of its members, as required by The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 149, in the case of a non-corporate district, is a fatal objection to the validity of a district-rate under that Act.

2. Concessum, that the estimate for a rate required by sect. 98 of that Act may be both for prospective and retrospective expenses, at least if the latter were within the six months limited by sect. 89.

3. *Quære*, whether a district-rate under that Act is rendered void when the estimate on which it is founded, as required by sect. 98, does not show with sufficient distinctness the sums required for each of the purposes in respect of which the rate was made?

SPECIAL case stated by the Quarter Sessions of the county of Nottingham.

The parish of Worksop, in the county of Nottingham, was duly formed in 1852 into a non-corporate district for the purposes of The Public Health Act, 1848, and the provisions of The Local Government Act, 1858, have been duly applied thereto. There is a Local Board of Health elected by the owners of property and rate-payers within the district. Alfred Brodhurst, a rate-payer within the district, is the appellant, and the Local Board of Health are the respondents. On the 7th June, 1862, the Local Board gave public notice of their intention to make a general district rate. The rate was in fact intended to be made to raise money for the payment partly of future charges and expenses, and partly of charges and expenses incurred within six months before the making of the rate. An estimate of the money required for the purposes in respect of which the rate was to be made was prepared and approved *by the Local Board before proceeding to make the rate. This [*952 estimate was entered in the rate-book as follows:—

“ 21 & 22 Vict. Estimate of the money required for the purposes in
cap. 98. respect of which the general district rate hereafter
set forth is to be made.

Purposes.	£	s.	d.
Salaries of officers	178	10	0
Rents, rates, and collector's poundage	70	18	3
Watering the public streets and expenses of fire-engine	61	0	0
Printing, stationery, advertising, and postage,	40	3	7
Election expenses. Filling in and covering old sewers and drains, and cleansing sewers and outfall	65	0	0
Law charges, surveyor's instruments, and incidental expenses	74	0	0
	<hr/> £489 11 10 <hr/>		

The rateable value of the property assessable for
the above rate 30,184 19 2

The amount of the rate necessary to be made for
such purposes upon each pound of such value . Sixpence.

The above estimate has been submitted to the Local Board and approved of by them.

As witness my hand, this 2d day of June, 1862.

(Signed) ROBERT WHITE,
Clerk of the said Board.”

The rate-book and the minute-book of the Board, containing the details of actual expenditure upon which the calculations of the estimate were based, were duly *kept in the office of the Board open to public [*953 inspection. The rate was declared made by a resolution of the Board passed at a Board Meeting, on the 16th June, 1862, and entered

upon the minutes of that meeting, which were signed in due course by the chairman at the next meeting of the Board.

The resolution was as follows:—

“The clerk produced general district rate at sixpence in the pound amounting to 428*l.* 15*s.* 11½*d.*, and the recoverable arrears amounting to 39*l.* 19*s.* 3*d.*; and it was moved by Mr. Worth and seconded by Mr. Marlin, and unanimously resolved, that the rate now produced be and the same is declared made, and that the clerk do cause notice of the making thereof to be given as required by law.”

The rate was set forth in the rate-book under this heading:—

“An assessment for a general district rate made by the Local Board of Health for the district of Worksop for defraying such expenses as are by The Public Health Act, 1848, and The Local Government Act, 1858, chargeable upon that rate, this 16th day of June, 1862, after the rate of sixpence in the pound, upon the several occupiers and other parties liable by law to be assessed thereto, to commence and be payable on the 17th day of June, 1862.”

No seal or signature of the Board was affixed to the rate in the rate-book.

The making of the rate was duly published.

Alfred Brodhurst appealed against the rate on several grounds, and the appeal was heard at the Quarter Sessions held on the 20th October, 1862. The material objections to the rate urged at the trial were these:—

*954] First. That the Local Board of Health had no power, *under the 89th section of the Public Health Act, 1848, to make one and the same rate for the payment of future expenses and of expenses previously incurred.

Second. That the estimate of the money required for the purposes in respect of which the rate was to be made did not show the several sums required for each of such purposes with the particularity required by the 98th section of The Public Health Act, 1848.

Third. That the rate was void under the 149th section of The Public Health Act, 1848, for want of the seal of the Local Board and the signature of five of its members to the rate in the rate-book.

The Quarter Sessions held that the Local Board had power to make one and the same rate for future and past expenditure: that the purposes in respect of which the rate was to be made were set forth in the estimate with sufficient particularity: but that the rate was void for want of the seal of The Board and the signature of five of its members. And they quashed the rate subject to the opinion of this Court to be taken by consent of both parties upon all the three above grounds of objection.

The case was argued for the first time in Easter Term, 1864, April 23d, before COCKBURN, C. J., and SHEE, J.

Welsby and Cave, for the appellant.—The 89th section of The Public Health Act, 1848, 11 & 12 Vict. c. 63, enacts “That the Local Board of Health may make and levy the said special and general district rates, or any or either of them, prospectively, in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses which may have *955] been incurred at any time within six months *before the making of the rate; &c.” And sect. 98 enacts, “That the Local Board

of Health, before proceeding to make any general or special district rate or private improvement rate under this Act, shall cause an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made, showing the several sums required for each of such purposes, the rateable value of the property assessable, and the amount of rate which for those purposes it is necessary to make upon each pound of such value; and the estimate so made shall forthwith, after being approved of by the said Local Board, be entered in the rate-book, and be kept at their office, open to public inspection during office-hours thereat." The rate here professes to be a general district rate under sect. 87, which enacts, "That the treasurer shall keep a separate account, to be called 'the district fund account,' and the moneys carried to such account under the directions of this Act shall be applied by the Local Board of Health in defraying such of the expenses incurred or to be incurred by the said Local Board in carrying this Act into execution, and not otherwise expressly provided for, as they may think proper; and the said Local Board shall from time to time, when and as often as occasion may require, make and levy, in addition to any other rate, a rate or rates to be called 'general district rates,' for defraying such expenses as are charged upon that rate by this Act, and such other expenses of executing this Act in any district as are not provided for by any other rate, or defrayed out of the said district fund account." But it must be a special district rate under sect. 86, and such rates are abolished by The Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 54. [COCKBURN, C. J.—Then this would *come under the latter part of [*956 sect. 87 of the first Act, which provides for the expenses of executing the Act which are not provided for by any other rate.] Perhaps so. The first point may be given up. But on the second the present estimate does not show with sufficient distinctness the several purposes for which the rate is made. The statute has placed great power in the hands of the Board, the exercise of which ought to be carefully watched, as much jobbing would ensue if a rate could be made for a lump sum without specifying for what purposes. [They also urged the necessity of the seal of the Local Board to the rate, under sect. 149, which enacts, "That whenever the consent, sanction, or approval or authority of the General Board of Health is required by the provisions of this Act, the same shall be in writing under their seal and the hands of two or more members thereof; and whenever the consent, sanction, approval, or authority of the Local Board of Health is so required the same shall (in the case of a non-corporate district) be in writing under their seal and the hands of five or more of them, or (in case of a corporate district) under their common seal."]

Bovill (*F. Lushington* with him), for the respondents.—The Board under this statute are empowered to make general rates affecting a whole district, special rates affecting a portion of it, and private improvement rates affecting particular individuals, and it is sufficient if they specify the amounts they require for each of those purposes. If the other side are right the Board would have to specify how much they required for every individual drain and every individual water closet. But, in any view of this point, the statute being only in the affirmative is simply *directory, *Dwarris on Statutes*, p. 606, 2d ed., and [*957 does not render the rate invalid if these conditions are not com-

plied with. A rate made under this Act not published as required by sect. 103 is not void: *Le Feuvre v. Miller*, 8 E. & B. 321 (E. C. L. R. vol. 92). [COCKBURN, C. J.—A poor-rate is not valid until publication.] That is by force of the language of stat. 17 G. 2, c. 8, and the Parochial Assessments Act, 6 & 7 W. 4, c. 96; *Reg. v. The Eastern Counties Railway Company*, 5 E. & B. 974 (E. C. L. R. vol. 85). [COCKBURN, C. J.—What remedy then has the ratepayer who is called on to pay a rate made without a proper previous estimate?] The Board might be indicted for a conspiracy to evade the statute. [THE COURT referred to *Reg. v. The Inhabitants of Fordham*, 11 A. & E. 73 (E. C. L. R. vol. 39).] A contract entered into by the Local Board under sect. 85 is not invalid because a previous estimate by a surveyor, as required by that section, was not obtained: *Nowell v. The Mayor, &c., of Worcester*, 9 Exch. 457. [He also cited *Rex v. The Justices of Leicester*, 7 B. & C. 6 (E. C. L. R. vol. 14), and on proceeding to argue the question as to the necessity of the seal of the Local Board, &c., was stopped by the Court.]

Welsby, having been called on by the Court to reply, said he did not contend that the rate was void, but simply that it could not be enforced, and was voidable on appeal. [He cited *Reg. v. The Justices of Kingston upon Thames*, E. B. & E. 256 (E. C. L. R. vol. 96).]

Cur. adv. vult.

The judgment of the Court was delivered, at the Sittings after Michaelmas Term, 1864, December 18th.

*958] *COCKBURN, C. J.—This was a case on an appeal to the Court of Quarter Sessions of the county of Nottingham, against a general district rate, made by the respondents, the Local Board of Health of the non-corporate district of Worksop, on the 16th June, 1862.

The objections to the rate were as follows:—

First. That the estimate of the money required for the purposes in respect of which the rate was made did not show the several sums required for each of such purposes with the particularity required by the 98th section of The Public Health Act, 1848, 11 & 12 Vict. c. 63.

Second. That the respondents had no power under the 89th section to make one and the same rate for the payment of future expenses and expenses previously incurred.

Third. That the rate was void under the 149th section for want of the seal of the Board and the signature of five of its members, to the rate in the rate book.

The Court of Quarter Sessions held the first and second of these objections to be unfounded; but they held the third objection to be fatal to the rate.

We have no difficulty in holding the decision of the Sessions as to the second objection to be right. The 89th section of the Act authorizes the making of rates by the Local Board, to raise money for the payment of charges and expenses which may have been incurred within six months before the making of the rate; and it is not stated in the case before us that the expenses which this rate provided for retrospectively were of an earlier date. This being so, we see no objection to past and future expenses being provided for, so long as they are sufficiently specified in the estimate, in one and the same rate.

As regards the first head of objection, the 98th section *of the Act provides that an estimate shall be prepared by the Board of [•959 the money required for the purposes for which the rate is made, showing the several sums required for each of such purposes, the rateable value of the property assessable, and the amount of rate which for those purposes it is necessary to make upon each pound of such value. And, by sects. 98 and 100, the estimate so made is, after approval of it by the Local Board, to be entered in the rate-book, to be open to public inspection at the office of the Board during office hours—any person being at liberty to inspect and take copies of or make extracts from it without fee or reward; and whosoever, having the custody of it, refuses to allow such inspection, or the taking of such copies or extracts, becomes for such offence liable to a penalty of 5*l*. An estimate was in the present instance prepared and approved, as is set forth in the case, by the Local Board, but some of the items appear to us to be open to objection, as combining incongruous items in one lump sum, in a manner inconsistent with the requirements of the Act, and tending to conceal instead of conveying the information as to the local expenditure which it was intended that the ratepayers should have. In the items—"Salaries of officers 178*l*. 10*s*."—"Rents, rates, and collector's poundage 70*l*. 18*s*. 8*d*."—"Watering the public streets and expenses of fire engine 61*l*."—"Printing, stationery, advertising, and postage 40*l*. 3*s*. 7*d*."—the objects of expense mentioned have that sort of affinity to each other which in any ordinary statement of outlay would make it not improper to include them in the same class. In items thus grouped, though the exact amount already expended, or to be expended, upon any one object, is not stated, a proximate conjecture may *be formed of it by [•960 comparing the sum for the whole item with the various objects for which such sum is stated to be required. As to these items, therefore, we think there is in this estimate a substantial, though not a literal, compliance with the requirements of the 98th section; but it is otherwise as respects the sixth and seventh items, viz., "Election expenses. Filling in and covering old sewers and drains, and cleansing sewers and outfall 65*l*."—"Law charges, surveyor's instruments, and incidental expenses 74*l*." We think the ratepayers are entitled to know the amount of election expenses and law charges as well as of salaries of officers, and of rents, rates and collector's poundage. We think election expenses and law charges should not be mixed up with expenses of a totally different character and which do not, in the smallest degree, assist in the formation of a proximate conjecture as to their amount.

While, however, we have no hesitation in saying that the estimate in question is not a sufficient compliance with the requirements of the 98th section, a very serious difficulty presents itself as to what should be held to be the consequence of the defectiveness of the estimate as respects the validity of the rate. On the one hand, it is contended that compliance with the provisions of the 98th section as regards the estimate is a condition precedent to the authority to make the rate; on the other, it is said that the enactment is directory only, and at most can only expose the Local Board to such proceedings as may be the consequence of disobedience to the directions of a statute or the non-performance of a statutory duty; but that the non-compliance with such directions in no way affects the validity of the rate. It appears to us that very

***961]** serious inconvenience will be *likely to ensue from our holding in favour of either of these conflicting views. On the one hand, if we hold the provisions of the 98th and following sections to be conditions precedent to the validity of the rates to be made under this Act, the omission of any of the particulars in the estimate required by the 98th section, however unimportant, or the uniting of two or three items not belonging to the same class, though no practical inconvenience might arise therefrom, may be made a ground of exception to the validity of a rate, and so a door may be opened to a captious ratepayer to harass the Local Board and cause expense to the ratepayers by appealing against the rates necessary to carry out the purposes of the Act. On the other hand, if we hold the requirements of the 98th section to be, as was contended by the respondents, directory only, it is obvious that a provision which is essential to protect the ratepayers against undue expenditure or abuse may be set at nought or rendered practically ineffectual, inasmuch as any remedy which the parties interested may have by indictment or other proceedings for breach of duty would, as against a public body, probably be of little practical avail.

We are on reflection so much impressed with a sense of the mischief which might arise from our pronouncing in favour of either of these views, as likely to lead to such a course of conduct as we have suggested, that we have deemed it better, finding that in our judgment the third ground of objection is fatal to the rate, to abstain from pronouncing an opinion on this part of the case, so as to leave the question an open one.

We think the decision of the Court of Quarter Sessions, in holding ***962]** the want of the seal of the Local Board *to be fatal to the validity of the rate, was right. It has been urged against it that the 149th section does not apply to acts done by the Board itself, but only to acts done (that is, as contended, done by others) with the consent of the Board, its sanction, approval, or authority. But the section provides that whenever the approval of the Board is required by the provisions of the Act, such approval shall be in writing under its seal and under the hands of two or more members of it,—and the fact that the 98th section expressly provides that the estimate shall be approved by the Local Board, and entered in the rate-book as the basis of the rate, seems also to imply that the rate itself shall be so approved. Besides, the making of the rate is clearly a thing for which the “sanction” and “authority” of the Local Board is required, and is therefore within the express enactment of the 149th section. We cannot doubt that it was the intention of the Legislature in this section, that the power intrusted to the Local Board of rating the inhabitants within its district for the purposes of the Act should not be exercised without observance of the formalities which are necessary to give security to the ratepayers that the estimate and the rate are the result of a deliberate exercise of judgment and discretion on the part of those who, being elected members of the Board under the provisions of the Act, are empowered by it to make the estimate and rate.

Our judgment therefore is that the order of the Quarter Sessions, quashing the rate, be confirmed. Order of Sessions confirmed.

In Hilary Term, 1865, *Bovill* applied that the question on which the ***963]** Court had decided against the validity of the *rate, namely, the absence of the seal of the Local Board of Health to the rate,

might be re-argued, as on the argument the Court had expressed an opinion in favour of the Local Board on that point, and stopped him. The Court acceded to this application; and the case was accordingly re-argued in Easter Term, 1865, April 26th, and Trinity Term, 1865, June 13th, before COCKBURN, C. J., BLACKBURN, MELLOR and SHEE, JJ.

Bovill and *Bristowe*, for the respondents.—It is not necessary that the seal of the Local Board should be attached to this rate in the rate-book. Stat. 11 & 12 Vict. c. 63 contains many provisions by which the approval or authority of the General Board of Health is required, and the first clause of sect. 149 renders their seal necessary solely for the purpose of authenticating that approval or authority, and does not refer to any other acts to be done by them. So also the second clause of the section relates to cases in which the approval or authority of the Local Board is required for doing acts in the exercise of their powers in relation to sewers, drains, the cleansing of streets, removal of nuisances, inspection of lodging-houses, &c. [He referred to the group of sections 41–66.] There are ample materials for the words to act upon without making them operate on a rate or a contract entered into by the Local Board. [COCKBURN, C. J.—The making of the rate is not done by the Board itself, but by their clerk under their authority. BLACKBURN, J.—By sect. 98 the Board, before proceeding to make a rate, shall cause an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made, and the estimate so made shall, after being approved *by the Board, be entered in the rate-book [*964 and kept at their office for inspection: it is difficult to understand why the seal of the Board should be required to the approval of the estimate for the rate and not to the more important act of making the rate.] The estimate is not to be entered in the rate-book until the Board have approved it. [BLACKBURN, J.—Sect. 99 requires that public notice shall be given of the intention of the Board to make a rate: that looks as if the estimate was not intended to be final.] Sect. 103 expressly enacts that all rates made or collected under the authority of the Act shall be published in the same manner as poor-rates, “and shall be made in such manner and form, and be collected by such persons, and either together or separately, or with any other rate or tax, as the Local Board of Health shall from time to time appoint.” And by sect. 117, which constitutes the Local Board of Health surveyor of the highways, it is provided, “that neither the allowance by justices, nor the signature by the Local Board of Health, shall be necessary in the case of any rate made by the Local Board of Health under this Act.” The proviso in this section would have negatived also the necessity of the seal being affixed to rates if sect. 149 had been understood by the Legislature as applicable to them. [BLACKBURN, J.—The proviso only says that the signature of the Local Board shall not be necessary because a corporation cannot give its signature.] It assumes that the highway-rate will be made in the old form; and that is by resolution of a body who are elected by the ratepayers, which also requires confirmation. By sect. 106 the production of the rate-book is made *primâ facie* evidence of the making and validity of the rate. If the *seal were required to be affixed to a resolution for making a rate it would be required to be affixed to every resolution of [*965

the Local Board affecting property. If this clause applies to a rate, sect. 85, which enacts that contracts for carrying the Act into execution whereof the value or amount shall exceed 10*l*. shall be in writing and sealed with the seal of the Local Board, would be unnecessary; as also would sect. 111, which prescribes the form of a mortgage under the Act, and sect. 115, which prescribes the mode of making by-laws, requiring in both cases the seal of the Board to be affixed. [BLACKBURN, J.—Those provisions would be superfluous, but not inconsistent with sect. 149: acts which the Local Board do in the exercise of their common-law powers as a corporation would not be within that section.] Sect. 123, which provides for disputes as to the amount of compensation to be made under the provisions of the Act, directs that the appointment of an arbitrator on behalf of the Local Board shall be under their seal. [He also referred to sects. 34, 35, 36, 37, 40.] Further, the second clause of sect. 149 renders the seal of the Local Board necessary only in the same cases in which the consent, sanction, approval, or authority of the General Board is required.

Mellish and Cave, contra.—The language of stat. 11 & 12 Vict. c. 63, s. 149, is plain. By that section the seal and signature of five or more members of the Local Board in a non-corporate district is intended to have the same effect as the common seal of the Local Board in a corporate district, and is required for the same purposes. This enactment is superfluous as regards corporate districts, because for them the seal is required *966] by the *common law: why these Boards were not made corporations in express terms is not intelligible. The Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 61, (a) dispenses with the seal in the case of any summons, demand, or notice or other such document proceeding from the Local Board under the 11 & 12 Vict. c. 63, or any supplemental Act or that Act. The term “authority,” in sect. 149, must mean the act of the Board in giving orders to persons to do anything; and so sect. 149 is the only one which prescribes how that shall be done. The argument that sects. 85 and 111 are superfluous is of no weight, for the object of those sections was to remove the necessity which existed at the common law of the contracts there mentioned being signed by all the members of the Board. The enactment in sect. 103, that the rates “shall be made in such manner and form” as the Local Board shall from time to time appoint, means only that the particular form in which poor-rates are made shall not be necessary. According to the argument on the other side, the Legislature has not provided how the rate shall be authenticated. By sect. 106 the rate-book is *prima facie* evidence of the validity of the rate, but by sect. 35 the rate-book must be authenticated. [BLACKBURN, J.—The latter section only provides for making documents proceeding from the Local Board evidence. But if the making a rate proves an authority from the Local Board to make a rate it comes within sect. 149. MELLOR, J.—Sect. 90, which empowers the Local Board to make private improvement-rates, does not prescribe how they are to be made; therefore sect. 149 must apply to such rates, and *967] if so, why not to other rates? COCKBURN, *C. J.—a quasi corporate district does not levy the rate: either the rate is an authority to the collector to levy it; or if not he requires some other, and that must be under sect. 149, and therefore under seal.

Cur. adv. vult.

(a) See The Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 222.

On the 14th June, the judgment of the Court was delivered by BLACKBURN, J.—This case was in the first instance, argued before the Lord Chief Justice and my brother SHEE, and again before the Lord Chief Justice, my brothers MELLOR, SHEE and myself. We have considered the judgment and arguments, and I now deliver the judgment of my brothers and myself.

The judgment originally delivered was in all respects that which we should have given, and therefore, without repeating the reasons there assigned, it will be considered as the judgment of the whole Court.

COCKBURN, C. J.—I wish to add, that on the first argument we were hasty in stopping the counsel for the respondents. But we considered the matter very fully, and came to the conclusion that the absence of the seal of the Local Board was fatal to the rate, and therefore that it ought to be quashed.

Order of Sessions confirmed.

***IN THE EXCHEQUER CHAMBER. [*968**

WATSON v. RUSSELL. Nov. 29.

Money had and received.—Privity of contract.—Failure of consideration.—Check.

The defendant chartered a ship to K. at a certain rate per week, to be paid every four weeks in advance. On the second payment becoming due, K. received from the plaintiff, through whom he had sub-chartered the ship to B., a check for half the amount due, payable to the order of the defendant, upon the terms that K. should inform the defendant that the advance was made in consideration that the ship should be allowed to perform the charter. K. paid the check to the defendant; but omitted to inform him of the terms on which it had been given, and he had no notice of them; and, the remainder of the money being unpaid, the defendant, who had obtained cash for the check, stopped the ship: Held, affirming the judgment of the Queen's Bench, that an action for money had and received to recover the amount of the check was not maintainable by the plaintiff against the defendant, as there was no privity between them, and that the action, if any, ought to have been brought by K.

THIS was an appeal from the judgment of the Queen's Bench in this case, reported vol. 3, p. 34; which was now heard before ERLE, C. J., POLLOCK, C. B., BYLES and KEATING, JJ., and BRAMWELL, CHANNELL and PIGOTT, BB.

Brett, for the plaintiff.—First. Supposing the defendant had a right to retain the full amount of the check as against Keys, he had no right to do so as against the plaintiff. If indeed the sum were paid in coin or bank-notes, or even if it were allowed in a mercantile account, the instructions given by the plaintiff to Keys could not affect the defendant. But this is an order on the plaintiff's bankers to pay a certain sum of money, which is not negotiable in the hands of Keys: for it is not made payable to bearer or to Keys, but to the defendant or order. It was therefore given to Keys as agent to hand over to the defendant. If it had not been cashed the plaintiff might have recovered it from the defendant in trover, as handed over without his authority; and its [*969 *having been cashed can make no difference in the plaintiff's right to it.

Second. At all events, the plaintiff is entitled to recover half the amount of the check. By the agreement the hire of the ship was payable in advance, half of which had been already paid. With respect to

the other half the defendant, as against Keys, had his option either to retain the money or stop the ship, but could not do both; and he has done the latter.

Edward James and Milward, who appeared for the defendant, were not called on.

ERLE, C. J.—The judgment of the majority of the Court below must be affirmed. The plaintiff's check was a negotiable security, and, as such, having been taken by the defendant for value without notice, he has a right to keep it, although the plaintiff may be the true owner as between himself and Keys. Then, however, it is said the consideration for the check failed; that, on default of payment of the hire agreed on, the defendant had no right both to stop the ship and also receive the money paid to him in respect of that default. This is questionable, for a right of action for the 120*l.* having been once vested in the defendant, it is not easy to see how it became divested by the subsequent seizure of the ship. But, supposing it did, and that the defendant is not entitled as against Keys to retain the 60*l.*, or that Keys may maintain an action for the seizure of the ship, still that is a matter between themselves, and can in no way entitle the plaintiff to maintain this action.

The rest of the Court concurring,

Judgment affirmed.

*970] *IN THE EXCHEQUER CHAMBER.

GRAY and Wife v. PULLEN and HUBBLE. Nov. 29.

Statutory obligation.—Contractor.—Action.—Metropolis Local Management Act, 18 & 19 Vict. c. 120, ss. 77, 110, 111.

1. Where a statutory obligation is imposed on a person, he is liable for any injury that arises to others in consequence of its having been negligently performed, and this whether it were performed by himself or by a contractor employed by him.

2. A. was empowered under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, ss. 77, 110, 111, to make a drain from his premises to a sewer, by cutting a trench across a highway, and filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B.: Held by this Court, reversing the decision of the Queen's Bench, that A. was responsible in an action by B.

THE first count of the declaration alleged that the defendants dug and caused to be dug a deep hole and trench in, along and across a certain public and common highway, and thereby greatly obstructed the same and rendered it dangerous to persons lawfully using it, by means of which premises and of the mere carelessness and wrongful and improper conduct of the defendants in that behalf, the plaintiff Maria, being the wife of James Gray, who was then lawfully walking in and along the highway, fell into the hole and trench, and was greatly hurt, bruised and wounded, and became and was sick, &c., for a long time, &c., and had become greatly and permanently injured in health, and the plaintiff James had been deprived of her comfort, &c., and been put to expense, &c., and the plaintiffs were otherwise injured.

Second count. After the passing and coming into force of The Metropolis Management Act, 1855, the *defendants being authorized
*971] to break up the pavement and open the surface of a street being

a common highway within the Metropolis as defined by that Act for a lawful cause, (to wit) for making a drain, did break up the pavement and open the surface for the said cause, yet the defendants did not with due diligence cause the ground to be filled up, and the pavement to be reinstated, and the surface to be made good, in a proper and substantial manner, and did not in the meantime fence or guard the same or affix or maintain lights during the night near the places where the ground was open, so as to prevent any accident, but therein wholly failed and made default, by means of which premises and of the mere carelessness, negligence, wrongful and improper conduct of the defendants in that behalf the said Maria, being the wife of the said James, whilst lawfully passing along the said highway whilst the said surface was open fell into the opening and was injured, and the plaintiffs respectively sustained damage as in the first count set forth, &c.

Pleas by the defendant Pullen.

First. Not guilty.

Second. As to so much of the first count as charges that the defendants dug and caused to be dug a deep hole and trench in, along and across a certain public and common highway, and thereby greatly obstructed the same and rendered it dangerous to persons lawfully using it, and thereby causing the damages therein complained of: that the highway was situate in the Greenwich district mentioned in schedule B. of the Act of Parliament for the better local management of the Metropolis (18th and 19th Victoria, c. 120), and the *defendant was [*972 possessed of a certain house situate within the district, and was desirous of making a drain from that house into a certain sewer situate in the same district and vested in the district Board of the district, and that the drain was a drain which the defendant was by the said Act of Parliament authorized to make, and that thereupon the defendant, in pursuance and according to the powers given to him by the said Act, at his own expense made the said drain; and that all things had been and were done and happened and existed, and all times elapsed, necessary to entitle him to make the same under and according to the statute; and in so doing the defendant necessarily dug and caused to be dug the said hole and trench in the highway, the same being a necessary part of the work of the making of the drain and thereby necessarily obstructed the highway and rendered the same dangerous, as he lawfully might.

The defendant Hubble pleaded Not Guilty, by statute 25 & 26 Vict. c. 102, s. 106, The Metropolis Management Amendment Act, 1862.

Issues on all the pleas.

On the trial, before Blackburn, J., at the Sittings in London after Hilary Term, 1863, the following state of facts appeared in evidence.

The defendant Pullen was the owner of a house and premises situate at the corner of Clark's Terrace, Lewisham Road, where it is crossed by Evelyn Street, having a garden attached to the house and extending for some distance down Evelyn Street, parallel with and next adjoining the same, being only divided from it by the garden wall. The defendant Hubble was inspector *of nuisances under the District Board of Works for the Lewisham district, in which the house was [*973 situate, formed under The Metropolis Local Management Act, 18 & 19 Vict. c. 120; and, having been applied to by the occupier of the house

in respect of a nuisance caused by a cesspool situate in the garden belonging thereto, gave notice to the defendant Pullen, the owner, under the provisions of that Act, and required him to cure the nuisance, pointing out that it could be done by making a drain from the cesspool carrying it under the garden wall, and thence across the public footpath in Evelyn Street, adjoining the garden wall, into a pipe drain in Evelyn Street running along the side of the footpath and so into a sewer in Nicholas Street vested in the district Board. The defendant Pullen thereupon employed the defendant Hubble as a contractor to do the work in question for the sum of 20*l.*, and the same was accordingly done under the immediate inspection and direction of the defendant Hubble, and the earth filled in over the drain and the work left for a few days afterwards, namely on the night of the 25th April, 1863, the female plaintiff, whilst passing along Evelyn Street on the public path next adjoining the garden and across which the drain had been made, fell violently into a hole or trench over the drain and sustained injuries complained of, without any negligence on her part. There had been heavy rains a day or two before the accident, which had caused the ground so to sink as to make the hole into which the female plaintiff fell.

At the close of the plaintiffs' case the learned Judge ruled that there was no evidence to go to the jury that Hubble had acted as the servant of Pullen in making the drain, but the evidence was that he **974]* acted as a contractor for the work; that the defendant Pullen had authority to cause the drain to be made under stat. 18 & 19 Vict. c. 120, s. 77, and did not come within the scope of the 110th and 111th sections of that Act so as to be responsible for the performance of the work. He accordingly withdrew the consideration of the case against Pullen from the jury; and as to the defendant Hubble, he left it to them to say whether the filling in of the hole or trench over the drain had been properly done, or whether there had been any negligence with regard to the filling in of the same. The jury found that the ramming in of the earth was insufficient, and found a verdict against Hubble with 65*l.* damages; and thereupon the learned Judge directed a verdict to be entered for the defendant Pullen, but reserved leave to the plaintiffs to move to enter the verdict against him also under the 110th and 111th sections if, on the proper construction of the statute, he was responsible for the surface of the drain not having been properly filled in.

In Easter Term, 1863, April 16th,

H. Mills moved accordingly.—The defendant Hubble was a contractor, not a servant, and is therefore liable for mischief occurring to others through his negligence. But, as regards the defendant Pullen, the case turns on the second count of the declaration, and on sects. 110 and 111 of The Metropolis Local Management Act, 18 & 19 Vict. c. 120. Sect. 110 enacts, "Whenever it is necessary, from any cause whatever, for any Company or person to break up or open the pavement, **975]* surface, or soil of any street, such street, and the pavement, surface, and soil thereof, shall be broken up and opened under the superintendence of the vestry or district Board of the parish or district in which the same is situate, and in such manner, and as regards gas Companies at such time, as they shall direct; and such Company

or person shall with all convenient speed complete the work on account of which the same is broken up or opened, and fill in the ground and make good the pavement or surface or soil so broken up or opened, and carry away the rubbish occasioned thereby, and shall in the meantime cause the place where such pavement or surface or soil is so broken up or opened to be fenced and guarded, and shall set up and maintain upon or against the part of the pavement, surface, or soil so broken up or opened a sufficient light during every night that such pavement or surface or soil is continued open or broken up." And by sect. 111, "If any Company or person authorized to break up or open any of the pavement or surface of any street, for the purpose of laying, altering, or repairing any gas, water, or other pipe, or other lawful cause, do not with due diligence cause the ground to be filled in, and the pavement to be reinstated, and the surface to be made good, in a proper and substantial manner, or do not in the meantime fence and guard the same, and affix and maintain lights during the night near to the places where any ground is open, so as to prevent any accident, every such Company or other person so offending shall for every such offence forfeit a sum not exceeding five pounds, and also a further sum not exceeding forty shillings, for every day during which such offence continues; and no such pavement shall be *considered to have been reinstated in a proper and substantial manner by any such Company or other [*976 person unless the same have been reinstated with the same or similar materials of the like quality and thickness, and cemented and bound together in the same or in an equally substantial manner, as those of which it was composed, in such manner as is satisfactory to the vestry or Board."

By these sections a statutory liability is cast on the defendant Pullen, who has broken up the surface of this street, to replace it, or cause it to be replaced, in a safe condition. He relies in his defence on sect. 77, which enacts, "it shall be lawful for any person, at his own expense, to make or branch any drain into any of the sewers vested in the Metropolitan Board of Works or any vestry or district Board under this Act, or authorized to be made by them under this Act, such drain being of such a size, and of such conditions, and branched to such sewer, in such a manner and form of communication in all respects as the vestry or Board shall direct or appoint; and in case any person make or branch any drain into any of the said sewers so vested in the vestry or Board, or authorized to be made by them under this Act, of a larger size, or of different conditions, or in a different manner and form of communication than shall be directed or appointed by the vestry or Board, every person so offending shall for every such offence forfeit a sum not exceeding fifty pounds." It may be conceded that this takes away his common-law liability. [CROMPTON, J.—How then can you sue the two jointly; for there is no statutory liability cast on Hubble?] Hubble can only justify under the person who employed *him. In *Hole v. The Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488, [*977 where an incorporated railway Company were authorized by their Act of Parliament to construct an opening bridge across a public navigable channel; the Act providing that the Company, or those acting under them, should not detain a vessel navigating that channel for a longer space of time than should be sufficient to enable any trains, carriages,

animals, or passengers ready to traverse the railway or carriage-road over the bridge to cross it, and for opening the bridge to admit the vessel to pass, under a penalty, without prejudice to any remedy for damages caused by such detention; the Company employed a contractor to construct the railway and works according to the Act, but before they were completed the bridge became out of repair and could not be opened, whereby the plaintiff's vessels were prevented navigating the river, it was held he was entitled to recover damages. When a duty is cast on a person by statute, he can no more shift it than a sheriff can shift his duty by changing his bailiff. [BLACKBURN, J.—In *Ellis v. The Sheffield Gas Company*, 2 E. & B. 767 (E. C. L. R. vol. 75), Erle, J., says, p. 768, "It seems to me that, if trespass were brought for breaking a man's close, and the facts were that the plaintiff's fields had been ploughed up by persons who had contracted with the defendant to plough it at so much an acre, the verdict on not guilty should pass for the plaintiff, inasmuch as the defendant had employed the men to commit the trespass." CROMPTON, J.—In *Hole v. The Sittingbourne and Sheerness Railway Company*, Wilde, B., puts the case thus, p. 500–1, *978] "The present defendants were authorized to take *land for the purpose of their railway, and to build a bridge over the Swale. Instead of erecting the bridge themselves, they employed another person to do it. What was done was done under their authority. In the course of executing their order, the contractor, by doing the work imperfectly, obstructed the navigation. It is the same as if they had done it themselves. It is not distinguishable from the case where a landowner orders a person to erect a building upon his land which causes a nuisance. The person who ordered the structure to be put up is liable, and it is no answer for him to say that he ordered it to be put up in a different form."]

COCKBURN, C. J.—There ought to be no rule. There is nothing to take this case out of the common doctrine that if a person in the exercise of a right, either as a private individual or conferred by statute, employs a contractor to do work, and the contractor is guilty of negligence in doing it, from which damage results, he and not the employer is liable. The case is clearly distinguishable from *Hole v. The Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488. There a Company was authorized to construct a bridge across a navigable river, and in order to prevent obstruction to the navigation, they were directed by their statute to make a swing-bridge so as to allow the passage of vessels. For this purpose they employed a contractor, who constructed the bridge in such a manner that it would not swing. Where a statutory duty is imposed on a Company, and they have not discharged it, and mischief results, it is no answer that that arose by reason of the *979] manner in *which the duty was discharged by their contractor. But in the present case a certain person was authorized by statute to break up a public pavement, with this condition attached that he should make the temporary obstruction good with all convenient speed, and should be liable to a penalty if he did not. All that is meant by this and similar enactments in other statutes is, that where persons in the exercise of the statutory power interfere with a public highway, they shall, as quickly as possible, fill up any opening they create in the surface, and make good what they had temporarily interfered with. But

the same obligation apart from the penalty existed independently of the enactment, and every person violating that obligation is liable to private individuals for any obstruction of their rights. If the contractor was the party liable independent of the statute he remains so still.

CROMPTON, J.—I am of the same opinion. I should be sorry to introduce more refinements into this branch of the law than are in it already. It is admitted by Mr. *Mills* that Hubble was a contractor, and not a servant, and also that if he had not been negligent in the discharge of his duty this mischief would not have happened. I agree with the Lord Chief Justice that the requisitions contained in this enactment are expressly or impliedly contained in all statutes which give persons a right to interfere with highways; a thing that practically must be done by contractors. Where anything connected with the real property of a party is done in such a manner as to cause a nuisance, the person who does it is liable, and that is the real ground of the decision *in *Hole v. The Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488. There the defendants had no right [*980 to obstruct the highway. If the bridge opened it would be no obstruction; if it created one, they were liable at any time. But the present case is nothing more than that a contractor employed to do a lawful act was negligent in his duty.

BLACKBURN, J.—I concur in thinking there ought to be no rule. As the Lord Chief Justice and my brother Crompton have pointed out, the defendant could not be liable for the act of those who opened this drain imperfectly, unless the statute put him in such a position that having opened the drain he warranted that the soil should be filled in again. I do not think the two sections relied on have that effect. Sect. 110 of stat. 18 & 19 Vict. c. 120, expressly imposes on a person much of a duty that probably would be cast on him by the common law. But that is for the purpose of introducing the following section, the 111th, which imposes a penalty, and I think was not at all intended to impose a liability on an employer for the conduct of his contractor. The mischief here arose entirely from the negligence of the contractor in doing the work, not in the work itself, and for that negligence I do not think the owners of property who employed him are responsible.

MELLOR, J.—I am of the same opinion. In *Hole v. The Sittingbourne and Sheerness Railway Company* there was a perpetual obligation on the defendants. In the present case I agree there is no warranty from the *defendant Pullen. Opening the surface of the street [*981 was a lawful Act, and he was bound to take the necessary means to make it safe again. The person whom he employed did it negligently, but for that the employer is not liable, at least not in the present case.

Rule refused.

The plaintiff having appealed to the Exchequer Chamber against this decision, the case was argued November 26th, 1864, before ERLE, C. J., POLLOCK, C. B., KEATING, J., and BRAMWELL, CHANNELL and PIGOTT BB.

Joseph Brown (*Daly* with him), for the plaintiff.—It may be conceded that at common law a man is not liable for the negligence of a contractor employed by him. But here the defendant Pullen creates a public nuisance in a public road by digging a trench across it, an act which could only be justified under powers conferred by statute; and the statute

which confers that power, namely, The Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 77, imposes on him by sects. 110, 111, a correlative duty of filling the trench in again so as to render it safe for foot passengers. He has neglected to do so, and is liable from that liability by having employed a contractor to do the work. These two last sections were framed for the protection of the public, and therefore should receive a liberal construction. It was not that the public should have the responsibility of the person who dug up the soil, not that of the contractor who perhaps could not prevent the mischief, but that of the party who neglected to do so. [*982] It is true sect. 111 inflicts a penalty on disobedience, but that it is not for the benefit of the party aggrieved, since by sect. 234 half goes to the informer and half to the district Board. [BRAMWELL, B.—The penalty is for doing the work, whether any particular mischief results from it or not.] Where a statute imposes a duty, but gives no penalty to the party aggrieved by its non-performance, that party is entitled, on common law principles, to maintain an action for the mischief: *Couch v. Steel*, 3 E. & B. 402 (E. C. L. R. vol. 77), *Stevens v. Jeacocke*, 11 Q. B. 731 (E. C. L. R. vol. 77), and several other cases. [*H. James*, who appeared for the defendant, said this would not be disputed.] And he cannot relieve himself from that liability by employing a contractor to do the work: *Hole v. The Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488; *Pickard v. Smith*, 10 C. B. N. S. 470 (E. C. L. R. vol. 100). [He also referred to *Blake v. Thirst*, 2 H. & C. 20.]

H. James, for the defendant.—In every case where a duty is cast on a person either by common or statute law he is bound to discharge it. The Metropolis Local Management Act, 18 & 19 Vict. c. 120, ss. 77, 110, 111, empowers a party to do what would otherwise be illegal. In *Overton v. Freeman*, 11 C. B. 867 (E. C. L. R. vol. 73), Maule, J., says, p. 871, "It is urged by Mr. Stammers that the defendants are liable in respect of this being a public nuisance; and it is insisted that there is some greater degree of liability in respect of this being a public wrong, than would ordinarily attach in the case of a mere private injury. I do not, however, perceive that there is any distinction between the two [*983] which is at all favourable to the plaintiff's argument. I rather think the liability for a public wrong is less extensive than the civil liability. A man is often civilly liable where no wrong was intended." But there is a great difference between nonfeasance in not discharging a duty, and the misfeasance of it by a person delegated to perform it. Here a contractor was employed to do this work, and he did it improperly; the negligence which was the primary cause of the accident had nothing to do with the contract. *Ellis v. The Sheffield Gas Company*, 2 E. & B. 767 (E. C. L. R. vol. 75), is an authority for the defendant. On *Overton v. Freeman* being cited, Lord Campbell says, p. 768, "In that case the parties made a contract to do a lawful act; for they were authorized to pave the streets: and the nuisance arose from the negligence of the sub-contractor, who, when he was negligent, was not doing what he was employed to do. But here *Watson Brothers* by the contract bound themselves to the defendants to commit a public nuisance." In *Hole v. The Sittingbourne and Sheerness Railway Company* and *Pickard v. Smith*, the mischief sprung from the act, not from the contract.

Joseph Brown, in reply.

The judgment of the Court was now delivered by ERLE, C. J.—In this case the plaintiff declared wife from falling into a drain made in the highway. The defendant justified *making the drain under a power by The Metropolis Local Management Act, 18 & 19 Vict. c. 12, to make a drain from his premises to a sewer.

Upon the trial it appeared that the defendant had lawfully made the drain under that Act, that is to say, a trench which was across the highway, the cause of the damage, and had employed a contractor both to make it and to fill it up properly, and by the negligence of the contractor the drain was filled up improperly, and so the damage was caused. At the trial the verdict was entered against the contractor and for the employer on the ground that the employer was not responsible for the negligence of the contractor, and so it was decided in the Court below, and this is an appeal from that judgment.

The appellant contends that a duty was imposed on the defendant Pullen, as the owner of the premises who caused the drain to be made across the highway, to fill up that drain in a proper manner. Sect. 77, authorizing the making of the drain, implies that the duty to fill it up was also imposed, and sect. 110 commands that the person who makes it shall fill it up properly, and the appellant contends that the person making the drain is responsible if the duty imposed on him by the statute is not performed and damage is caused thereby, and that the complaint is of an omission to perform a duty imposed by statute not of a wrongful act of commission by a contractor beyond the scope of his employment. He relied on *Hole v. The Sittingbourne Railway Company*, 6 H. & N. 488, where the duty imposed on the defendants by statute was to make a bridge that would open, and they employed a contractor who made a bridge that did not *open as the statute [*985 required; and the defendants were held liable on the ground of their omission to perform the duty imposed by statute. There the Chief Baron says, in effect, that a party who undertakes that a work shall be done is not released from liability for breach of his undertaking because he employed a contractor to do it, and the contractor's neglect caused the breach; the obligation imposed by that is analogous to that created by an undertaking, the omission to perform which is not excused by reason that the party employed a third person as contractor to do it for him who failed: and he distinguished the case where a contractor in the performance of his contract does a wrongful act not according to his contract and causes damage thereby; in those cases the employer is not responsible. This distinction is also taken by Williams, J., in *Pickard v. Smith*, 10 C. B. N. S. 470, 480 (E. C. L. R. vol. 100), deciding that the employer allowing a coal merchant to make an opening in a way for coal is responsible for the negligence of the coal merchant's men in omitting to close the opening; for the employer was bound to see that the opening should be properly closed, and his omission to perform his duty is not excused by the omission of the agent whom he had employed to act for him.

For these reasons it appears to us that the defendant Pullen is not excused from liability for the omission to fill up the drain properly, on the ground that he had employed a contractor to do that duty for him,

and the contractor was negligent and left the duty unperformed. We think that the duty was implied in the grant of the power to open the drain in a highway in sect. 77, and was expressed in sect. 110; and that *986] this statutable *duty is created absolutely, and is not a duty created by sect. 111 imposing a penalty to be enforced solely by enforcing the penalty. The penalty imposed by sect. 111 appears to us to be a cumulative remedy.

The question is, whether the verdict should be entered against the defendant Pullen, and we answer that question in the affirmative.

Judgment reversed.

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I. On the 22d October, 1862, by deed between S. and the defendant, S., in consideration of 50*l.* advanced by the defendant, assigned all his household furniture and effects to the defendant, with a proviso for making the deed void if S. should, on demand in writing given to him, or left at his last place of abode, pay the 50*l.* with interest; and in default of payment contrary to the proviso, "then at any time" thereafter the defendant was empowered to take possession of and sell the goods; and until default S. was to retain possession of them. At the same time S. gave the defendant his acceptance at four months for 50*l.* as collateral security, which the defendant endorsed over for value. On the 12th February, S. was taken in execution and committed to the county gaol. On the 16th, the defendant, knowing S. to be in gaol, left a demand in writing at his house, and took possession of the goods the same evening, and continuing in possession sold them on the 13th March. On the 18th February, S. having made the affidavit required by sect. 98 of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, petitioned in formâ pauperis, and on the 23d was brought up to the County Court and adjudicated a bankrupt under the 99th section. In trover by the official assignee against the defendant: Held,

1. That if the taking possession on the 16th February, the day of the demand, was premature, that did not prevent the defendant from taking possession afterwards in due time.

2. That the taking of the acceptance and endorsing it over for value did not suspend the right of the defendant to take possession under the bill of sale.

3. That by sect. 103 of stat. 24 & 25 Vict. c. 134, the adjudication related back to the date of the commitment of S. to prison, and therefore the goods which were then in his order and disposition by the consent of the defendant passed to the official assignee, and the transaction was not protected by sect. 133 of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106.

4. *Quære*, whether sect. 103 applies to an adjudication made by the registrar under sect. 101? *Bramwell (Official Assignee of Service, a Bankrupt), v. Eglinton*, 39

II. A plea of a composition deed within "The Bankruptcy Act, 1861", 24 & 25 Vict. c. 134, made between the defendant and his creditors, relating to his debts and liabilities, and his release therefrom, is pleadable in bar to an action by a non-assenting creditor. *Whitehead and Others v. Porter*, 193

III. Such a plea need not set out the deed. *Id.*

IV. Declaration on the common counts. Plea. A deed made between the defendant of the first part, E. H. of the second part, and L. J. of the third part, E. H. and the several other persons whose names and seals were thereunto set, or who in writing had assented to or approved of the deed, of the fourth part, and the several persons named in the second schedule of the fifth part; which, after reciting that the defendant was possessed of or entitled to certain personal property, and was indebted to E. H. and the several other persons parties thereto of the fourth part, and to the persons parties thereto of the fifth part, in the sums mentioned and set opposite to their names in the first and second schedules respectively; and an arrangement had been made that all the creditors should take in full discharge of their respective debts a composition of 10*s.* in the pound by two instalments of 7*s.* 6*d.* in the pound and 2*s.* 6*d.* in the pound; and it was, at the request of E. H., agreed that the said personal estate should remain under the control and disposal of the defendant; and E. H., at the request of the defendant, and in consideration, &c., agreed to enter into the covenants thereafter contained; and it was agreed that the deed should contain the release and other provisos thereafter appearing: Witnessed that, in consideration of the premises, the defendant and E. H. covenanted with L. J. to pay him, on registration of the deed, such sum as should be sufficient to pay to all the creditors 7*s.* 6*d.* in the pound on the amount of their respective debts, provided that as regarded the liabilities under the covenants, the separate liability of E. H. should be treated as being in priority to the joint and several liabilities of him and the defendant, and also to the separate liability of the defendant; and the defendant and E. H. covenanted with L. J. that they would, before the expiration of twelve months from the date of the deed, pay to L. J. such sum as should be sufficient to pay the remaining instalment of 2*s.* 6*d.* in the pound to all the creditors, other than E. H.; and the defendant covenanted with E. H. to pay him on the registration of the deed, and on or before the expiration of twelve months from the date, the instalments of 7*s.* 6*d.* in the pound and 2*s.* 6*d.* in the pound respectively; and it was declared that

L. J. should stand possessed of the sums to be paid in respect of the instalments upon trust, after the registration of the deed, upon demand in writing by E. H. and the other persons creditors of the defendant, to pay E. H. and the other persons the instalment of 7s. 6d. in the pound; and after the expiration of twelve months after the date of the deed, upon such demand, to pay the creditors the remaining instalment of 2s. 6d. in the pound; and E. H. and the persons parties thereto of the fourth part released the defendant from all debts and demands which the parties of the second and fourth parts had against him; averring that a majority in number representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10l. and upwards, did in writing assent to and approve of the deed. Held, per Cockburn, C. J., Blackburn and Shee, JJ., that the deed was a valid deed within sect. 192 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, inasmuch as (1), it did not enable E. H. to receive a larger dividend than the other creditors. (2), Cockburn, C. J., dubitante, it did not give such an advantage to E. H. in respect of the recovery of his instalment as to make the deed void. (3), It was a release of the non-executing creditors as well as of those who executed it. *Wells v. Hacon*, 196

V. Declaration on the common counts. Plea. A deed dated the 14th December, 1861, made between the defendant of the first part, J. P. of the second part, and certain persons who were then creditors of the defendant, and who would then have been entitled to prove under an adjudication of bankruptcy against the defendant, founded on a petition filed on the day and year last aforesaid, of the third part; by which the debtor, besides conveying all his real estate to J. P., his heirs and assigns, assigned his personal estate and effects unto J. P., his executors, administrators and assigns, in trust for his creditors, and which contained, among others, the following clauses: (1). That J. P., his executors or administrators, might appoint an attorney, clerk, or accountant, and depute to him the powers and authorities thereby given to J. P., his executors or administrators. (2). That the creditors before becoming entitled to a dividend should, if required by J. P., his executors or administrators, deliver a statement in writing of their debt or claim, with all the particulars usual in a proof in bankruptcy, and should, if required by J. P., his executors or administrators, verify such debt or claim by his solemn declaration. (3). "That all creditors to whom bills or other negotiable instruments might have been given by the defendant for the debts due to such creditors, or any of them or any part hereof, should indemnify the defendant and his estate against all claims or demands by other persons than

themselves in respect of such bills or instruments, and all losses, damages and costs by reason or in respect thereof, and should, if any such bills had been endorsed or transferred to any other persons, take the same up and retire the same before or when they should become due, and so as to prevent any claim or demand in respect thereof being made upon the defendant or his estate." (4). That J. P., his executors or administrators, might convene a meeting of the creditors by notice, stating the subject to be brought forward, and all resolutions passed by the major part in number and value of the creditors present, personally or by proxy, should be valid, and bind all the creditors. (5). That if the deed could not operate under the provisions in The Bankruptcy Act, 1861, nevertheless it should be binding on all creditors who should execute or accede to it. (6). If it should be decided by any competent legal tribunal that the deed was not binding, J. P. was empowered to execute a further deed or deeds under the provisions of The Bankruptcy Act, 1861.

1. Held that clause (3) imposed upon creditors who had received bills or other negotiable instruments an unreasonable obligation, and therefore was not binding upon non-assenting creditors of that class; and consequently the deed was void, as not fulfilling the conditions required by sect. 192 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134.

2. *Quære*, whether the other clauses were objectionable?

3. *Quære*, whether it was objectionable that the powers of the trustee under the deed were continued to his executors and administrators? *Balden v. Pell*, 213

VI. Declaration by drawee against acceptor of a bill of exchange. Plea. A composition deed made between the defendant of the first part, a trustee of the second part, and the executing or assenting creditors on behalf of themselves and all the creditors of the defendant of the third part, by which the defendant covenanted with the trustee to appropriate half of his future net income from his profession of attorney until 5s. in the pound should be realized and paid to his creditors (the amount of such income to be ascertained and paid at certain times therein mentioned). And the creditors covenanted with the defendant to accept the deed in satisfaction of their debts, claims, and demands against the defendant, and released the defendant and his future estate from their debts, claims, and demands: provided that the release should not prejudice or prevent any of the creditors from claiming or realizing any security held by them, or from suing any person other than the debtor liable to payment thereof for the recovery thereof, less the amount received by them under the deed, nor prejudice the rights or remedies of any such creditors except as against the debtor. Held,

1. That the deed was a valid deed within sect. 192 of The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, inasmuch as the covenant by the defendant was not unreasonable.

2. That notwithstanding the proviso reserving remedies against sureties the deed was pleadable in bar. *Keyes v. Elkins*, 240

VII. On the 30th October, 1862, a sequestrari facias, at the instance of the defendant, a judgment-creditor of G., issued to the Bishop of W., and on the 31st, at 9.38 a. m., was lodged at the office of the Bishop's Registrar. On the 1st November a sequestration issued, which was published on the 2d. On the 31st October, G. petitioned for adjudication of bankruptcy against himself, and his petition was filed on the same day at 12.25 p. m.; on the 17th November the plaintiff was appointed creditors' assignee, and on the 9th January, 1863, applied for a sequestration, which issued on the 10th, and was published on the 18th. Held, by the Exchequer Chamber, affirming the judgment of the Queen's Bench,

1. That the profits of the benefice did not pass to the plaintiff under The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, until he had obtained a sequestration.

2. That the defendant was not "a creditor having security for his debt" within sect. 184 of The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which disentitles such a creditor from receiving more than a rateable part of his debt.

3. And therefore that the defendant was entitled to the profits of the benefice as against the plaintiff. *Hopkins, Creditors' Assignee of the Estate of the Rev. A. W. Gregory, a Bankrupt, v. Clarke*, 753

BARRISTER.

See CONTEMPT OF COURT, II., III.

BELLIGERENT.

See INTERNATIONAL LAW, IV.

BENEFICE, PROFITS OF.

See BANKRUPT, VII.

BILL OF EXCHANGE.

I. A plaintiff who commences an action under The Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67, for a cause within the jurisdiction of the city of London Small Debts Court, and, after the defendant has obtained leave to plead under sect. 2, recovers an amount not more than 50*l.*, is deprived of his costs by the London (City) Small Debts Extension Act, 1852, 15 & 16 Vict. c. lxxvii. s. 119. *Harris v. Swinburn*, 370

II. *Semble* that the position laid down in some books, that the holder of a bill of ex-

change who has brought an action on it, cannot transfer it to another endorsee for value so as to enable him to sue, if the endorsee had notice of the pendency of the former action, cannot be supported. *Deuters v. Townsend*, 613

III. To an action on an overdue bill of exchange for 25*l.*, drawn by L. payable to himself or order three months after date, accepted by the defendant, and endorsed by L. to the plaintiff, the defendant pleaded that, before the commencement of the suit, A., being the holder of the bill, commenced an action against the defendant upon it, when it appeared, as the fact was, that L. had endorsed the bill, which action was still pending. The plea then averred the identity of the sums claimed in both actions, and that the plaintiff became the holder of the bill, and L. endorsed the same to him after it became due, without consideration and with notice of the pendency of the former action, and of the premises: held, that the plea was bad. *Id.*

IV. Declaration by the executor of B. upon a bill of exchange purporting to be drawn by A. and accepted by the defendant, and endorsed by A. to B.; with a count upon accounts stated. Plea, that A. did not endorse the bill. It appeared that A., who was possessed of goods, being the stock in trade upon his premises, died intestate, and indebted to the defendant and other persons; and it was arranged between B. and the defendant, who were two of his next of kin, that the defendant should take possession of the goods and accept a bill of exchange for their value, purporting to be drawn and endorsed by A. The goods were accordingly delivered to the defendant, and the bill declared upon was drawn and endorsed to the plaintiff by procuration in the name of A., and accepted by the defendant.

1. Held, by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the defendant could not be allowed to set up as a defence to the action that the bill was not endorsed by A.

2. *Semble*. That the bill was evidence of an account stated. *Ashpitel, Executor of James Peto, v. Bryan*, 723

BILL OF SALE.

See BANKRUPT, I.

BOARD, BURIAL.

See ECCLESIASTICAL LAW, IV.

BOARD, DISTRICT.

See METROPOLIS LOCAL MANAGEMENT ACT.

BOARD OF HEALTH.

I. By the Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 45, Local Boards of Health are authorized to make and maintain sewers, subject to the conditions in sect. 145 that they shall not use, injure, or interfere with any

watercourse, stream, river, &c., in which the owner or occupier of any lands, mills, &c., was interested, without consent in writing first had and obtained. The Local Government Act, 1858, 21 & 22 Vict. c. 98, having by sect. 63 repealed sect. 145 of stat. 11 & 12 Vict. c. 63, by sect. 73 prohibits the Local Board from doing any act injuriously affecting any reservoir, river or stream, &c., or the supply, quality, or fall of water contained in any reservoir, river or stream, "in cases where any Company or individuals would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, river, stream, &c.," without their consent in writing. The Local Board of D. made certain sewers in execution of the powers of stats. 11 & 12 Vict. c. 63, and 21 & 22 Vict. c. 98, and in doing so injuriously affected the stream S., without having obtained the consent of T., who was the occupier of a mill on the S., and entitled to the flow of the S. to his mill. T. obtained a mandamus to the Local Board for compensation, and made a claim: (1) For damage sustained in consequence of the Board opening the main sewer so as to allow the water of the S. to flow through it for forty-six hours. (2) For the water drawn from the S. and wasted by the main sewer being close to the S. (3) For a drain or trap door being made out of the S., and water allowed to flow out of the S. into the trap door. (4) For the Board having drained off the surface and refuse water from the streets of D. which had always run into the S.: Held,

1. That sect. 73 of stat. 21 & 22 Vict. c. 98, was not confined to cases in which a Court of equity would grant an injunction against the Local Board, and that T. was in the position of a person who would, if the Act had not passed, have been entitled by law to prevent the injuriously affecting the S.

2. That the works of the Local Board were not authorized by sect. 73, and therefore the claim of T. was not the subject of compensation, but ground of action.

3. *Quare*, whether the acts of the Local Board produced any damage of which T. could complain? *The Queen v. The Darlington Local Board of Health*, 515

II. By sect. 69 of the Public Health Act, 1848, 11 & 12 Vict. c. 63, in case any street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such Board may, by notice in writing to the owners or occupiers of the premises fronting, &c., such parts as require to be sewered, levelled, &c., require them to sewer, level, &c., the same; and if the notice be not complied with the Board may execute the works mentioned therein; and the expenses

incurred shall be paid by the owners in default.

1. Held, that the Local Board had no power to require the owner of a house to alter the part of the street which his house fronted so as to make it correspond with the level of adjoining streets.

2. *Semle*, by Cockburn, C. J., that the Local Board have power to require the level to be altered for the purpose of channelling. *Caley, Appellant, The Local Board of Health for the Borough of Kingston upon Hull, Respondents*, 815

III. A brook, the water of which was supplied by the drainage, natural and artificial, of a considerable area of cultivated soil belonging to private individuals, received at the lower end of it, near a river into which it flowed, the drains of two or three inhabited houses. By The General Enclosure Act, 41 G. 3, c. 109, s. 10, the Commissioners are to set out and appoint private roads, . . . drains, watercourses, &c., and the same shall be made and supported and kept in repair at the expense of the owners of the lands, directed to be divided and enclosed, in such proportions as the Commissioners shall direct. In 1809, Commissioners acting under a local Enclosure Act by their award set out this brook, among others, as a "public drain or watercourse," and directed that all such drains should be made, scoured and kept in repair at the expense of the proprietors of the lands, divided and enclosed by virtue of the Act, in equal proportions. They also cleared out the channel of the brook, and in various places widened and deepened it to render it more efficient as a means of draining a portion of the tract of land which was subject to the provisions of their Act. Afterwards two of the landowners, for their own convenience, altered the course of the stream, by cutting artificial channels for short distances. The brook is within the limits of the Local Board of G., and it having become a nuisance, a mandamus issued to them to clear, cleanse, empty and keep it.

1. Held, by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that it was not a "sewer" within The Public Health Act, 1848, 11 & 12 Vict. c. 63, and therefore was not vested in the Local Board of Health under sect. 43.

2. *Quare*, whether, supposing the brook to be a sewer, it was within the exception in that section of "sewers made and used for the purpose of draining, preserving, or improving land under any local Act of Parliament?"

3. Held, that a mandamus could not go to the Local Board of Health under sect. 46, to clear, cleanse, and empty and keep it. *The Queen v. The Local Board of Health of the Borough of Godmanchester*, 936

IV. The absence in the rate-book of the

seal of the Local Board of Health and the signature of five of its members, as required by The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 149, in the case of a non-corporate district, is a fatal objection to the validity of a district-rate under the Act. *The Queen v. The Workop Local Board of Health*, 951

V. Concessum, that the estimate for a rate required by sect. 98 of that Act may be both for prospective and retrospective expenses, at least if the latter were within the six months limited by sect. 89. *Id.*

VI. *Quære*, whether a district-rate under that Act is rendered void when the estimate on which it is founded, as required by sect. 98, does not show with sufficient distinctness the sums required for each of the purposes in respect of which the rate was made? *Id.*

BOARD, LOCAL.

See BOARD OF HEALTH.

BOND, ILLEGAL.

See COMPANY, RAILWAY, IV.

BOND, LLOYD'S.

See COMPANY, RAILWAY, IV.

BOUNDARIES.

See ECCLESIASTICAL LAW, III.

BROOK.

See BOARD OF HEALTH, III.

BRIDGE.

See COMPANY, RAILWAY, III.

BURIAL BOARD.

See ECCLESIASTICAL LAW, IV.

CARRIAGE.

Of animals. *See* COMPANY, RAILWAY, I., V., VI.

Hackney. *See* TOWNS POLICE CLAUSES ACT.

CERTIFICATE.

Of justices. *See* HIGHWAY, DIVERTING, &c.

Of Burial Board. *See* ECCLESIASTICAL LAW, V.

CERTIORARI.

See CORONER, IV., V., VI.

CHANCERY, ENROLMENT IN.

See ECCLESIASTICAL LAW, III.

CHANGING VENUE, ABUSE OF.

See VENUE, ABUSE OF CHANGING.

CHANNELLING STREET.

See BOARD OF HEALTH, II.

CHAPELRY.

See ECCLESIASTICAL LAW, III.

CHARTER-PARTY.

Declaration on a charter-party made at Liverpool between the plaintiff, the master of a Prussian vessel, guaranteed 577 tons English, and the defendant, as freighter or charterer, whereby it was agreed that the ship should take on board a full and complete cargo and proceed to Sydney, and deliver it there agreeably to bills of lading, in consideration whereof the affreighter should deliver the cargo to be loaded on board, &c., and should pay for the use and hire of the vessel in respect of the voyage, 1550*l.* in full, "on condition of her taking a cargo of not less than 1000 tons of weight and measurement," payment to be made as follows: viz., the captain to receive the freight payable abroad as per bills of lading, &c., and the balance to be paid in cash on sailing, less three months' interest; and that such goods only as the charterer might direct should be received on board, for which the mate should give a receipt and measure when tendered alongside, as well as for weight of coals when weighed into the vessel. Breach, that the defendant made default in loading the ship with a cargo as agreed, and did not pay the balance of 1550*l.* over and above the freight payable abroad as per bills of lading. Pleas. First, that the defendant did not make default in loading the ship with cargo as agreed. Third, that the ship did not nor could take a cargo of not less than 1000 tons pursuant to the condition. At the trial it appeared that the action was brought to recover the balance of freight payable in advance. The defendant had loaded the ship deep enough for her voyage with 855 tons, in the following proportions: weight goods 525, measurement goods 330; but she had still an unoccupied space for 160 tons of measurement goods. In order to load a vessel with as full a cargo as she could reasonably and practically carry, it was usual, according to Lloyd's rule and the custom generally adhered to at the port of Liverpool, to load her with one-third weight goods and two-thirds measurement goods. Some evidence was given of a usage that in a Sydney cargo the proportion was two-thirds weight and one-third measurement. The jury found that, assuming the vessel to be loaded with ordinary weight and measurement goods, the capacity of the ship was 1000 tons. Held, by the Exchequer Chamber, affirming the judgment of the Queen's Bench,

1. That the condition meant that the ship was capable of taking a cargo of 1000 tons of weight and measurement in the ordinary proportion at the port of loading, and therefore was fulfilled.

2. That this was not a condition precedent; and, if it were, the defendant could not plead it in bar, having received a substantial part of the consideration for his promise.

3. Concessum. That the breach that the defendant made default in loading the ship with a cargo as agreed, could not be sustained.

4. *Quere*, if the ship had fallen short of the capacity of 1000 tons weight and measurement in the ordinary proportion, whether advantage could be taken of it in reduction of damages? *Pust v. Dowie*, 20

CHECK.

See MONEY HAD AND RECEIVED.

CHURCH BUILDING.

See ECCLESIASTICAL LAW, III.

CHURCHWARDEN.

See ECCLESIASTICAL LAW, I.

CLERK.

See ARTICLED CLERK.

COLONY.

See FOREIGN DOMINION OF CROWN.

COMMISSIONERS.

Church Building. *See ECCLESIASTICAL LAW, III.*

Of Inland Revenue. *See TOWNS POLICE CLAUSES ACT.*

Of Police. *See COMMISSIONERS OF POLICE.*

Of Public Purposes. *See TRUSTEES FOR PUBLIC PURPOSES.*

COMMITMENT FOR CONTEMPT.

See CONTEMPT OF COURT. FOREIGN DOMINION OF CROWN.

COMMON LAW PROCEDURE ACT, 1854.

See APPEAL.

COMMON MEMORANDUM.

See INSURANCE, MARINE, II., III.

COMPANY.

Insurance.

I. If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative. *William Stirling, the Younger, v. Maitland and Boyd*, 840

II. An insurance Company covenanted with C. D. for valuable consideration to appoint him their agent in S., together with A. B., and that if A. B. should be displaced from the agency they would pay C. D. a certain sum; the Company having transferred their business to another Company, and wound up their affairs and dissolved themselves: Held that

this was a displacement of A. B. within the meaning of the covenant. *Id.*

Railway.

I. A railway Company is entitled to the protection against responsibility for the carriage of animals given by the second proviso in sect. 7 of The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, although no complete contract for carriage of the animal has been entered into, and no complete delivery of it has taken place; it is enough if the animal was in the course of being delivered to or received by the Company; per Blackburn and Mellor, JJ., dissentiente Cockburn, C. J. *Hodgman v. The West Midland Railway Company*, 173

II. The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 58, enacts, "if in the course of making the railway the Company shall use or interfere with any road they shall from time to time make good all damage done by them to such road;" and if any question shall arise as to damage or repair, it shall be referred to two justices; and they may direct such repairs, and within such period, as they think reasonable, and may impose on the Company for not repairing a penalty, which shall be paid to the surveyor, &c., of the road interfered with if a public road, or to the owner if a private road: provided that in determining any such question with regard to a turnpike road the justices shall make allowance for any tolls paid by the Company on such road in the course of the using thereof: Held, that justices had power to make an order upon a railway Company to repair highways which they had used by the carriage of materials over them for making the railway and works, although the materials were carried in the carts of contractors or of other persons employed by them. *The West Riding and Grimsby Railway Company, Appellants, The Local Board of Health for the District of Wakefield, Respondents*, 478

III. Under sect. 46 of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, a railway Company who, in carrying a railway over a highway by a bridge, lowered the level of the highway, is not bound to keep the slope of the road in repair as being part of the approaches on each side of the bridge. *The London and North Western Railway Company, Appellants, The Surveyor for the Township of Skerton, Respondent*, 559

IV. A railway Company were empowered by their special Act to raise a capital of 555,000*l.*, and to raise by mortgage any further sum not exceeding 185,000*l.*; but no part of such further sum was to be raised until the whole of the capital had been subscribed for and one-half paid up. Part only of the capital was

subscribed for; but the Company, being in want of money, determined to borrow 10,000*l.* to enable them to pay debts due to the contractor, engineer, solicitors, and for land, and also to meet a claim made by W. C. for travelling expenses and loss of time. The directors applied to their bankers, and obtained the sum required on the security of the joint and several promissory note of W. C. the then chairman of the Company, and of B., one of the directors. B., having been compelled to pay the money, brought an action against W. C. for contribution. The board of directors resolved that, "in order to discharge the liability of the chairman in the action of B. against him, the secretary be authorized to seal Lloyd's bonds to the extent of," &c. Bonds were accordingly sealed with the common seal of the Company, by each of which the Company "acknowledge that they stand indebted to W. C. in the sum of 1000*l.* for money due and owing from the said Company to the said W. C.; and the said Company, for themselves, their successors and assigns, hereby covenant with the said W. C., his executors and administrators, to pay to him, his executors, administrators, or assigns, the said sum of 1000*l.*, &c." These bonds were delivered to W. C., and he assigned them to one D. to secure money advanced by him, and with which money the action brought by B. against W. C. was settled. Subsequently, the directors resolved that the bonds should be redeemed, and that the expenses incurred by the chairman should be paid by the Company out of the first moneys in their hands. In an action brought by W. C. upon one of these bonds, held that, taking into consideration stat. 7 & 8 Vict. c. 85, The Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, and the special Act, the bond was illegal, and that he could not recover. *Chambers v. The Manchester and Milford Railroad Company*, 588

V. A railway Company issued a consignment note for the carriage of cattle from O. to B., one of the conditions of which was, "the Company are not to be amenable for any consequences arising from detention or delay in or in relation to the conveying or delivery of the said animals however caused:" held an unreasonable condition within the first proviso in sect. 7 of The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31. *Allday v. The Great Western Railway Company*, 903

2. *Semble*, a condition that a railway Company shall not be amenable for any damage arising from over-carriage, however caused, is unreasonable. *Id.*

COMPENSATION.

Under Lands Clauses Consolidation Act. See LANDS CLAUSES CONSOLIDATION ACT.

Under Metropolis Local Management Act. See METROPOLIS LOCAL MANAGEMENT ACT, I., II., III.

Under Public Health Act. See BOARD OF HEALTH, I.

COMPETENCY OF WITNESS.

See EVIDENCE.

COMPOSITION DEED.

See BANKRUPT, II., III., IV., V., VI.

CONCEALMENT.

Of material fact. See INSURANCE, MARINE, V., VI., VIII., X.

CONDITION.

Averment of performance of. See VEXATIOUS INDICTMENTS ACT.

Precedent. See CHARTER-PARTY.

Unreasonable. See COMPANY, RAILWAY, V., VI.

CONDUCTOR.

See POLICE, COMMISSIONERS OF.

CONSIDERATION, FAILURE OF.

See MONEY HAD AND RECEIVED.

CONSOLIDATED CHAPELRY.

See ECCLESIASTICAL LAW, III.

CONSPIRACY.

See QUARTER SESSIONS, I.

CONSTRUCTION OF POLICY.

See INSURANCE, MARINE, V.

CONSTRUCTIVE RELOADING.

See INSURANCE, MARINE, V.

CONTEMPT OF COURT.

I. Every Court of record has attached to its jurisdiction, as inherent in it, the power to punish for contempt: but if the Court is one of inferior jurisdiction, the Court of Queen's Bench has authority to intervene and prevent any usurpation of jurisdiction by it; and, if it treats conduct as a contempt which there is no reasonable ground for so treating, may interfere to protect the party upon whom the power to commit or fine for contempt has been improperly exercised. *Ex parte Pater*, 299

II. A barrister may be punished for contempt of Court, even for language professedly used in the discharge of his functions as advocate. *Id.*

III. The Court of Queen's Bench has, however, no jurisdiction to act as a Court of appeal in such cases. Therefore where, on a trial for

felony at the Middlesex Quarter Sessions, the counsel for the prisoner, whose mode of conducting the case had been remarked upon by the foreman of the jury, in his address to the jury uttered words which reflected upon the foreman, and being required by the Judge to withdraw them refused, and was thereupon adjudged guilty of contempt and fined, upon motion for a certiorari to remove the order: Held, that as the words used might have been and were by the Judge adjudged to have been used to insult the juror, there was no excess of jurisdiction, and the Court of Queen's Bench could not interfere. *Ex parte Pater*, 299

See FOREIGN DOMINION OF CROWN.

CONTRACT.

See COMPANY, RAILWAY, IV., V., VI.

CONTRACT, PRIVACY OF.

See MONEY HAD AND RECEIVED.

CONTRACTOR.

See COMPANY, RAILWAY, II. METROPOLIS LOCAL MANAGEMENT ACT, V. OBLIGATION, STATUTORY.

CONVICTING JUSTICES.

See QUARTER SESSIONS, II.

CONVICTION, SUMMARY.

See JUSTICES OF THE PEACE, JURISDICTION OF. QUARTER SESSIONS, II.

COPYRIGHT OF DESIGNS.

I. The Copyright of Designs Act, 1858, 21 & 22 Vict. c. 70, s. 5, declares "that the registration of any pattern or portion of an article of manufacture to which a design is applied, instead or in lieu of a copy, drawing, print, specification, or description in writing, shall be as valid and effectual to all intents and purposes as if such copy, drawing, print, specification, or description in writing had been furnished to the registrar under The Copyright of Designs Acts." Held, that it was a sufficient registration of a design applicable to the ornamenting woven fabrics comprised in class 12 of stat. 5 & 6 Vict. c. 100, to leave with the registrar a pattern or portion of the article of manufacture. *McOrea v. Holdsworth and Others*, 495

II. The plaintiff claimed as his design the particular collocation of the shaded and bordered stars upon an ornamented chain surface as shown in the registered pattern, thus forming together the ornamentation of the woven fabric: the stars and surface were old, but the combination was new: Held a new design, capable of being registered. *Id.*

CORONER.

I. Stat. 24 & 25 Vict. c. 100, s. 6, which enacts that "in any indictment for murder or

manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused," applies to a coroner's inquisition. *The Queen v. Ingham*, 257

II. A coroner's inquisition, which found A. B. guilty of manslaughter, omitted to state the time at which the offence was committed: Held, that the objection was cured by stat. 6 & 7 Vict. c. 83, s. 2, which enacts that no inquisition found upon any coroner's inquest shall be quashed "for omitting to state the time at which the offence was committed, when time is not the essence of the offence." *Id.*

III. It is not necessary that the jurors on such an inquisition should be sworn *super visum corporis*, or that they should be sworn at the same time, or that they should all view the body at the same time. *Id.*

IV. It is no ground for a certiorari to bring up a coroner's inquisition that evidence not upon oath was received. *Id.*

V. Or that the direction of the coroner to the jury was improper. *Id.*

VI. Or that there was no evidence to warrant the finding of the jury. *Id.*

COSTS.

See BILL OF EXCHANGE, I. HIGHWAY, REPAIR OF. QUARTER SESSIONS, II.

COTTON-MILL.

See RATE, POOR, I.

COUNCIL, ORDER IN.

See ECCLESIASTICAL LAW, III., V.

COUNSEL.

See CONTEMPT OF COURT, II., III. VENUE, ABUSE OF CHANGING.

COUNTS, SEVERAL.

See INDICTMENT.

COURT.

Contempt of. See CONTEMPT OF COURT.

Of Commission of Sewers. See RATE, POOR, II.

For Divorces and Matrimonial Causes. See HUSBAND AND WIFE.

Payment of money into. See INSURANCE, MARINE, XL

Of Record. See CONTEMPT OF COURT, I.

COVENANT.

See BANKRUPT, IV., V., VI. COMPANY, INSURANCE, II.

For title.

By deed dated the 9th September, 1861, re-

elting that the defendant had contracted with the plaintiff for the absolute sale to him of a messuage and hereditaments, and the inheritance thereof, free from all encumbrances, the defendant conveyed to the plaintiff and his heirs the messuage, &c., together with (inter alia) all rights, liberties, privileges, easements, profits, and appurtenances to the messuage, &c., belonging or in anywise appertaining, or usually held, occupied, or enjoyed therewith, or deemed or taken as part, parcel, or member thereof, or any part thereof, to the uses and upon the trusts therein mentioned; and the defendant covenanted that notwithstanding any act, deed, matter, or thing whatsoever made, done, or permitted to the contrary by the defendant or any person or persons claiming through, under, or in trust for him, he then had in himself good right and absolute authority by the deed to convey the messuage, &c., with their appurtenances. On the 22d June, 1842, the defendant, then being the owner in fee of the messuage, &c., by an agreement in writing with the owners in fee of an adjoining building, agreed that a certain cornice and certain spouts and pipes conducting the water into a spout belonging to the building, and the dripping of water from the eaves of the messuage, and the three windows on the east side of the messuage overlooking the building were encroachments by the defendant, and should and might be used by him so long only as the other parties to the agreement should consent thereto; and the defendant paid to the other parties 5s. as an acknowledgment, and agreed to pay 5s. per annum so long as the cornice, spouts, pipes, or windows should be used by him. At that time the defendant had not acquired any easement in respect of the cornice, spouts, pipes, or windows by the lapse of twenty years. The plaintiff, having been interfered with in the enjoyment of the easement by the owners of the adjoining building, brought an action against the defendant for breach of covenant. Held, that the defendant had conveyed the premises described so far as he possessed or could grant them; but that the covenant for title was limited to that which he actually had, or but for his own act would have had, and that the acknowledgment and payments were not an act within that covenant. *Thackeray v. Wood*, 325

CREDITOR.

See **BANKRUPT**, II., III., IV., V., VI., VII.

CREW.

Personal injury to, under running-down clause.
See **INSURANCE**, MARINE, I.

CROWN.

Foreign dominion of. See **FOREIGN DOMINION OF CROWN**.

CUSTODY, ILLEGAL.

See **JUSTICES OF THE PEACE**, JURISDICTION OF.

CUSTOM, LOSS OF.

See **LANDS CLAUSES CONSOLIDATION ACT**, I.

DAMAGES.

See **APPEAL**. **BOARD OF HEALTH**. **INSURANCE**, LIFE. **PUBLIC PURPOSES**, TRUSTEES FOR.

Reduction of. See **CHARTER-PARTY**.

Special. See **SLANDER**.

DAYS.

In port of discharge, how reckoned. See **INSURANCE**, MARINE, IX.

DEATH.

Manner, cause and time of. See **CORONER**, I., II.

DECEASE OF MAGISTRATE.

See **HUSBAND AND WIFE**.

DECLARATION.

See **INSURANCE**, MARINE, X. **WAY**, RIGHT OF.

DEED, COMPOSITION.

See **BANKRUPT**, II., III., IV., V., VI.

DELAY BY RAILWAY.

See **COMPANY**, RAILWAY, V.

DELIVERY OF ANIMALS.

See **COMPANY**, RAILWAY, I, V.

DEMAND.

See **BANKRUPT**, I., IV., V., VI.

DESIGNS, COPYRIGHT OF.

See **COPYRIGHT OF DESIGNS**.

DIRECTORS.

See **INSURANCE**, LIFE.

DISCHARGE.

Days in port of, how reckoned. See **INSURANCE**, MARINE, IX.

DISPLACEMENT.

See **COMPANY**, INSURANCE, II.

DISPOSITION.

See **FINES AND RECOVERIES**.

DISTRESS.

See **ELECTION**.

DISTRICT BOARD.

See **METROPOLIS LOCAL MANAGEMENT ACT**, I., II., III., IV.

Of Health. See **BOARD OF HEALTH**.

DISTRICT-RATE.

See BOARD OF HEALTH, IV., V., VI.

DRAIN.

See BOARD OF HEALTH, III. METROPOLIS LOCAL MANAGEMENT ACT, V.

DRAMATIC LITERARY PROPERTY.

K., the licensed proprietor of a theatre, under stat. 6 & 7 Vict. c. 68, entered into an arrangement with D. whereby D. had the use of the theatre for dramatic entertainments. D. provided the company, had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. K., on his part, paid for printing and advertising, furnished the lighting, door-keepers, scene-shifters and supernumeraries, and hired the band, music being a necessary part of the performance. The money taken at the door was taken by servants of K., who retained one-half of the gross receipts as his remuneration for the use of the theatre, and handed the other half to D. Among the pieces represented were two which L. had the sole liberty of representing or causing to be represented, &c., as assignee of the author, under the Dramatic Literary Property Acts, 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45. Held, by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that no action under those statutes was maintainable by L. against K., as the above facts did not show that those pieces had been represented, &c., by him, or that there was a partnership between D. and him so as to render him liable for the representation, &c., of them by D. *Lyon and Wife v. Knowles*, 751

DIVERTING HIGHWAY.

See HIGHWAY, DIVERTING, &c.

DIVORCE COURT.

See HUSBAND AND WIFE.

DUTY, POST-HORSE.

See TOWNS POLICE CLAUSES ACT.

ECCLESIASTICAL.

Law.

I. The doctrine laid down by Sir J. Nicholl, in *Jarratt v. Steele*, 3 Phillim. 167, 169-170, "that the possession of the church is in the minister and the churchwardens;—and that no person has a right to enter it when it is not open for Divine service, except with their permission, and under their authority," holds in the temporal as well as in the Ecclesiastical Courts: By the Exchequer Chamber; consisting of Erle, C. J., Williams and Willes, JJ., and Channell, B.; affirming the judgment of

the Queen's Bench, consisting of Cockburn, C. J., Crompton, Blackburn, and Mellor, JJ. *Mary Griffin v. Dighton and Davis*, 93

II. In a parish where there is both a lay rector and a vicar, the rector has no right to prevent the vicar having access to any part of the parish church by any of its doors. *Id.*

III. A consolidated chapelry, formed by order in council, on the representation of the Church Building Commissioners, under stat. 8 & 9 Vict. c. 70, s. 9, the boundaries of which are set forth in the order, is duly constituted without enrolment of the name and description of the boundaries in Chancery, even supposing it rendered essential by the provisions of stat. 59 G. 3, c. 134, s. 6. *The Queen on the Prosecution of the Burial Board of Christ Church Great Warley, v. The Overseers of South Weald*, 891

IV. By stat. 15 & 16 Vict. c. 85, s. 12, vacancies in a Burial Board may be filled up "when and as the vestry shall think fit." By stat. 18 & 19 Vict. c. 128, s. 4, every vacancy shall be filled up by the vestry within one month after the vacancy; and, in case of neglect, "the vacancy may be filled up by the Burial Board." Held, per Cockburn, C. J., and Blackburn, J., Crompton, J., dubitante, that the vestry might fill up a vacancy in the Board at any time before the Burial Board did so, though not within one month after the vacancy. *Id.*

V. On the 26th November, 1858, three vacancies occurred in the Burial Board of a consolidated chapelry formed under stat. 8 & 9 Vict. c. 70, none of which were filled up either by the vestry or the Board, until, on the 21st June, 1859, F. was appointed by the vestry to be a member of the Board. F. and two other members of the Board signed a certificate directing the overseers of S., one of the parishes a portion of which was included in the consolidated chapelry, to pay the proportion of the expenses incurred in respect of the burial ground chargeable on that part of the parish of S. On mandamus to the overseers of S., commanding them to pay or raise the necessary sum: Held, per Cockburn, C. J., and Blackburn, J., that F. was duly appointed, and therefore the certificate was valid; per Crompton, J., and Blackburn, J., that if quo warranto would lie for the office of a member of a Burial Board, as to which *quære*, the appointment of F. could not be questioned in this collateral proceeding, and then the certificate would be valid. *Id.*

Benefice. See BANKRUPT, VII.

EJECTMENT.

See INTERROGATORIES.

ELECTION.

By deed made the 4th September, 1843, B. granted to A. license to get all the copperas stone which might be found in a certain part of the manor of M. for twenty-one years, at the yearly rent of 25*l.*, payable half-yearly on the 24th June and 25th December, with a proviso that if any part of the rent should be in arrear for twenty-one days, it should be lawful for B., his heirs and assigns, by notice in writing delivered to A., his executors, administrators, or assigns, to determine the grant. On the 31st January, 1856, J. H., who had become assignee of the license, assigned the license to the defendants by way of mortgage, and on the 5th August, 1857, it was absolutely assigned to the defendants by arrangement under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, who by oral agreement granted to J. H. the enjoyment of all the rights under it on his paying the rent thereby reserved. On the 27th March, 1858, the plaintiff, who had purchased the manor in August, 1854, distrained goods of J. H. and E. H., his son, lying on the part of the manor mentioned in the license, for arrears of rent due at Christmas, 1857. J. H. and E. H. thereupon brought actions against the plaintiff for the illegal distress, in which he suffered judgment by default; and in 1858, negotiations for a settlement of the actions and for granting a new license to E. H. for a further term of twenty-one years, commencing on the 24th June, 1864, the day on which the grant of the 4th September, 1843, would expire, were carried on between the attorneys of J. H. and of the plaintiff, and it was verbally arranged between the plaintiff's attorney and the attorney for J. H. and E. H. that the actions should be settled on certain terms, one of which was, that such a license should be granted to E. H. These terms the plaintiff refused to carry out. On the 3d July, 1858, the plaintiff gave a written notice to the defendants and J. H., pursuant to the proviso, to determine the license. On the 11th January, 1859, the defendants tendered to the plaintiff 50*l.* for two years' rent due at Christmas, 1858, which the plaintiff refused to accept. In trespass for breaking and entering the plaintiff's close and taking away copperas stone, the Court having power on a special case to draw inferences of fact:

1. Held, by the Exchequer Chamber, affirming the judgment of the Court below, that the plaintiff, after the cause of forfeiture had occurred, sufficiently expressed and communicated to the defendants his determination to treat the license as existing, and was bound by that election, and therefore the subsequent notice was inoperative.

2. *Quære*, whether, the distress being within six months after the cause of forfeiture, the period within which, by stat. 8 Ann. c. 14, ss. 6, 7, a lessor may distrain after the determination of a lease, would by itself amount to an

election to treat the license as existing? *Ward v. Day and Another*, 359

ENCLOSURE ACTS.

See BOARD OF HEALTH, III.

ENDORSEMENT.

See BILL OF EXCHANGE, II., III., IV.

ENGAGEMENT, IMPLIED.

See COMPANY, INSURANCE.

ENGINE, FIXED.

See FISHERY, SALMON.

ENROLMENT.

See ECCLESIASTICAL LAW, III. FINES AND RECOVERIES, I.

ERROR.

See INDICTMENT.

ESTIMATE.

See BOARD OF HEALTH, V., VI.

ESTOPPEL.

See BILL OF EXCHANGE, IV.

EVIDENCE.

Upon an information, under stat. 5 G. 4, c. 83, s. 3, against a person able to maintain his wife and children, for neglecting and refusing to do so, whereby she and they became chargeable to a Union, the wife of the accused is not a competent witness against him. *Reeve, Appellant, Wood, Respondent*, 364

See CORONER, IV., VI. WAY, RIGHT OF.

Of account stated. *See* BILL OF EXCHANGE, IV.

Parol. *See* INSURANCE, MARINE, VIII.

EXCHANGE.

See BILL OF.

EXTRADITION.

See INTERNATIONAL LAW.

FAILURE OF CONSIDERATION.

See MONEY HAD AND RECEIVED.

FALSE PRETENCES.

See QUARTER SESSIONS, I.

FRIVOLOUS DEFENCE.

See HIGHWAY, REPAIR OF.

FELLOW SERVANT.

Negligence of. *See* MASTER AND SERVANT.

FENCING FOOTPATHS.

See TOWNS IMPROVEMENT CLAUSES ACT.

FINE.

See HIGHWAY, REPAIR OF.

FINES AND RECOVERIES.

I. The term "disposition" in 8 & 4 W. 4, c. 74, s. 88, abolishing fines and recoveries, is not restricted to the deed barring the entail, enrolled in Chancery under the Act, but comprises it and all other instruments by which the arrangement between the vendor and purchaser is carried out. *Crocker v. Waine*, 697

II. Concessum. A conveyance executed by a tenant in tail to himself or to his own use is a "disposition" under that statute. *Id.*

FIRE.

Goods consumed by. See INSURANCE, MARINE, II., VI.

FISHERY, SALMON.

The Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109, s. 11, enacts, "No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters;" "and for the purpose of this section a net that is secured by anchors, or otherwise temporarily fixed to the soil, shall be deemed to be a fixed engine." Three nets, six yards in length and one yard sixteen inches in depth, were set twelve yards apart, and extended to near the middle of a river; they were fixed at one end to a large stone on the bank, and at the other end of the net were kept up by corks with lead to keep them down; the net gave way as soon as a salmon touched it, and the fish, being entangled in it, died:—Held, not a fixed engine within that section. *Thomas, appellant, Jones, respondent*, 916

FIXED ENGINE.

See FISHERY, SALMON.

FOOTPATHS, FENCING.

See TOWNS IMPROVEMENT CLAUSES ACT.

FOREIGN DOMINION OF CROWN.

Stat. 25 & 26 Vict. c. 20, s. 1, enacts, that no writ of habeas corpus shall issue "into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court or Courts of justice having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion." In an act passed in the Isle of Man in 1817, "for altering and amending the criminal law in the said Isle," is the following proviso: "that nothing herein contained shall extend or be construed to extend to affect, abridge, or alter the power of Courts of justice and magistrates to punish contempts as formerly accustomed: and that the House of Keys, the Clerk of the Rolls, and the Registrars of the Ecclesiastical Courts, when in the execution of their respective offices, have and shall have

the power of punishing contempts in like manner as any Court or magistrate within the said Isle."

1. Held, that the Isle of Man is not a foreign dominion of the Crown, and therefore a writ of habeas corpus ad subjiciendum issues to it, notwithstanding stat. 25 & 26 Vict. c. 20, s. 1.

2. *Quære*, whether a colony or foreign dominion of the Crown, in which there is a Court having authority to issue a writ similar in its nature and effect to the writ of habeas corpus, is within that statute?

3. Held, that the House of Keys as a legislative body has not inherent power to commit for contempt; and that The Manx Act of 1817 did not give such power to it when acting in its legislative capacity. *Ex parte Brown*, 280

FORFEITURE.

See ELECTION. INSURANCE, LIFE.

Of lease. See INTERROGATORIES. LEASE.

FRIVOLOUS DEFENCE.

See HIGHWAY, REPAIR OF.

FUNDS, MEANS OF RAISING.

See PUBLIC PURPOSES, TRUSTEES FOR, II.

GENERAL AVERAGE.

See INSURANCE, MARINE, II., V., VII.

GENERAL SEWERS TAX.

See RATE, POOR, II.

HABEAS CORPUS AD SUBJICIENDUM.

See FOREIGN DOMINION OF CROWN.

HACKNEY CARRIAGE.

See TOWN POLICE CLAUSES ACT.

HEALTH, BOARD OF.

See BOARD OF HEALTH.

HIGHWAY.

See BOARD OF HEALTH, II. COMPANY, RAILWAY, II., III. METROPOLIS LOCAL MANAGEMENT ACT, V.

Diverting and stopping up.

I. Justices of the peace have no power under stat. 5 & 6 W. 4, c. 50, s. 85, to order a highway to be stopped up because, in consequence of matters to arise at some future time, another road not yet made *will be* "nearer or more commodious to the public." *The Queen v. The Local Board for Midgley*, 621

II. On appeal to the Quarter Sessions against a certificate of justices ordering certain roads to be diverted and others to be stopped up, the Court may, under sect. 87, confirm the order as to the stopping up, and quash it as to the diverting. *Id.*

Rate. See RATE, HIGHWAY.

Repair of.

Stat. 5 & 6 W. 4, c. 50, s. 98, empowers the Court before whom an indictment for non-repair of a highway is preferred to award costs to the prosecutor if it shall appear to the Court "that the defence made" was frivolous or vexatious. By stat. 3 G. 4, c. 126, s. 110, when a parish is indicted for not repairing a highway being turnpike road, and the Court shall impose a fine for the repair of the road, such fine shall be apportioned, together with the costs attending the same, between the parish and the trustees, &c. An indictment was found against the inhabitants of a township for non-repair of a highway, which was also a turnpike road, and the defendants pleaded guilty, having three days before the Assizes given notice of their intention to do so, and a fine was imposed, the levying of it being respited to a subsequent Assizes. At those Assizes the Judge made an order, which, after reciting that it did not seem just that the fine should be apportioned between the inhabitants of the township and the turnpike trustees, ordered that a sum sufficient for the repair should be levied upon the inhabitants of the township; and, after further reciting that the defence made was frivolous, awarded costs to the prosecutor. Held, that the Judge had no power, under either enactment, to make that part of the order which related to costs. *The Queen v. The Inhabitants of the Township of Denton*, 821

HOLDER.

See BILL OF EXCHANGE, II., III.

HOUSE OF KEYS.

See FOREIGN DOMINION OF CROWN.

HULL.

See INSURANCE, MARINE, II., VIII.

HUSBAND AND WIFE.

See EVIDENCE.

Under stat. 20 & 21 Vict. c. 85, s. 21, the application to discharge an order for the protection of a wife's property must be made to the magistrate by whom it was granted; or, *semble*, to the Court for Divorce and Matrimonial Causes. *The Queen v. T. J. Arnold, Esquire*, 822

ILLEGAL.

Bond. See COMPANY, RAILWAY, IV.

Custody. See JUSTICES OF THE PEACE, JURISDICTION OF.

IMPLIED ENGAGEMENT.

See COMPANY, INSURANCE.

INDICTMENT.

Where an indictment contains several counts, it is not ground of error that no verdict has been given on some of them, provided a ver-

dict has been found on one good count, and judgment given generally. *Latham and Others v. The Queen*, 635

See HIGHWAY, REPAIR OF. RATE, HIGHWAY. Vexatious. See VEXATIOUS INDICTMENTS ACT.

INFORMATION, WANT OF.

See JUSTICES OF THE PEACE, JURISDICTION OF.

INJURIOUSLY AFFECTING LANDS.

See LANDS CLAUSES CONSOLIDATION ACT, I., II., III.

INJURY.

See OBLIGATION, STATUTORY.

INLAND REVENUE, COMMISSIONERS OF.

See TOWNS POLICE CLAUSES ACT.

INQUISITION.

See CORONER, I., II., III., IV.

INSTRUMENT, NEGOTIABLE.

See BANKRUPT, V.

INSURANCE.

Life.

A deed by which the defendant assigned a policy of insurance on his life for 1000*l.* to trustees for his creditors, contained a covenant that he would not do any act or thing by which the policy should be forfeited. The policy was subject to a condition that if the assured should go beyond the limits of Europe without license from the directors the policy should be void. In an action for a breach of covenant in that the defendant went beyond the limits of Europe without license from the directors: Held, that the measure of damages was the present value of the policy to be assessed by an actuary, taking into consideration the fact that the defendant covenanted to pay and should pay premiums on the policy. *Hawkins and Another v. Coulthurst*, 843

Marine.

I. A policy of marine insurance for 4000*l.* for twelve months on the ship "Rouen" and her freight, contained the following clause: "And we the assurers do further covenant and agree that in case the said vessel shall, by accident or negligence of the master or crew, run down or damage any other ship or vessel, and the assured shall thereby become liable to pay and shall pay as damages any sum or sums not exceeding the value of the said vessel Rouen and her freight, by or in pursuance of any judgment of any Court of law or equity given in any suit or action defended with our previous consent in writing, or by or in pursuance of any award made upon reference entered into

by the assured with our previous consent in writing, we the assurers shall and will bear and pay such proportion of three-fourth parts of the sum so paid as aforesaid, as the sum of 4000*l.* hereby assured bears to the value of the said vessel Rouen and her freight." The ship "Rouen" having run down another ship, whereby some of her crew were drowned, and the owners of The Rouen having been condemned by the Court of Admiralty to pay damages to the personal representatives of the deceased for the loss of those lives: held, that the above clause did not apply. *Taylor and Others v. Dewar*, 58

II. In a policy of insurance upon a steamer, in the ordinary form, the hull and the machinery were separately valued, with a clause, "average on the whole or on each as if separately insured." The steamer had discharged her cargo at C., and while she lay there without any cargo on board, her hull was damaged by fire. The costs of repairs to the hull amounted, after a deduction of the usual one-third, to 386*l.* 12*s.* 6*d.*, including the sum of 9*l.* 0*s.* 1*d.* for Lloyd's surveyors' fees. An additional sum of 55*l.* 5*s.* 10*d.* was expended in extinguishing the fire. It was proposed to add this to the other sum, so as to take the case out of the common 3 per cent. memorandum. In an action for particular average on the hull: held, by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that these expenses must be apportioned to the hull and machinery according to their respective values, and that only the sum due for the hull could be added to the direct loss on the hull. *Oppenheim and Others v. Fry*, 348

III. A policy of insurance was effected upon freight to "be valued at as under." The policy was in the usual form, containing the common memorandum, which was immediately followed by the words, "On freight warranted free of capture, seizure, piracy, detention, or the consequences of any attempt thereat." In the margin nearly opposite, but a little above these words, "1300*l.*" was written in figures. Held, that this was not a valued policy. *Wilson v. Nelson*, 354

IV. Policies of insurance are to be construed according to the same rules as all other written contracts, namely, by ascertaining the intention of the parties, to be gathered in the first instance from the words of the instrument, but interpreted, if necessary, by the surrounding circumstances. By the Exchequer Chamber, affirming the decision of the Queen's Bench. *Carr and Josling v. Sir Moses Montefiore, Bart.*, 408

V. A policy of insurance was effected on the ship "Dos Hermanos" and her cargo "at and from port or ports in the river Plate to the United Kingdom," &c., "beginning the adventure upon the said goods and merchandises

from the loading thereof aboard the said ship at as above;" the insurance being effected to protect the interest of the owners resident in the river Plate. The cargo had been shipped in Patagonia on board the ship, then bearing another name, destined for England. She arrived at Monte Video in the river Plate in a damaged state, and a portion of her cargo was taken out for the purpose of repairing her, and then reloaded. On being repaired, she and her cargo were purchased by parties at Monte Video, who changed her name, and the above insurance was afterwards effected. An average loss of the ship and cargo having taken place: held that the underwriters were liable. *Id.*

VI. *Quare*, by the Court of Queen's Bench, of the doctrine in *Boyd v. Dubois*, 3 Campb. 133, that if goods which are insured are put on board a ship in a state likely to take fire, and they are consumed by some other cause, the policy is not vitiated by the fact of the state of the goods not having been disclosed to the underwriters. *Id.*

VII. The plaintiffs effected with the defendants a policy of assurance on a ship and her cargo of guano, which contained the following clause: "free from all average or claim arising from jettison or leakage unless consequent upon stranding, sinking, or fire." During the voyage the ship, by tempestuous weather, became leaky, and was compelled to put into a port, and was there found unfit to proceed on her voyage, which was abandoned, and the ship and goods sold. Held, by the Queen's Bench, and judgment affirmed in the Exchequer Chamber, that the plaintiffs were entitled to recover as for an average loss. *Carr and Another v. The Royal Exchange Assurance Corporation*, 433

VIII. Declaration on a policy of insurance on a ship called The Knar Borantinsky, "at and from the Tyne to Odessa or another port in the Black Sea," the length, breadth, draught and tonnage whereof were specified in a memorandum on the face of the policy at the time of making the policy. Plea, unseaworthiness, on which issue was joined. On the trial it appeared that, before the execution of the policy, the plaintiff wrote letters to the defendant describing the dimensions, &c., of the ship, and stating that she was a new iron steamer, and took no cargo, but only coals enough for her use to Gibraltar, where she would coal again. The dimensions of the ship were also stated in a memorandum on the policy. The ship was intended, after accomplishing the voyage, to be employed in river navigation only, and was, as to her hull, built and adapted to such navigation exclusively, and could not by any strengthening appliances be rendered fit to encounter the ordinary perils of the voyage; but before commencing the voyage certain appliances were put into and upon her hull to

assist her in encountering the perils of the voyage. The Judge directed the jury that if the plaintiff had, before the execution of the policy, brought to the knowledge of the defendant the nature and description of the vessel, and the more than ordinary risk that such a vessel would necessarily encounter on the voyage, and if the vessel at the time of commencing the voyage had been by the strengthening appliances made as seaworthy as a vessel of such a nature and description could reasonably be made, they should find for the plaintiff. The jury having found for the plaintiff:

1. Held, that the direction was right, for that the warranty of seaworthiness was limited to the capacity of the vessel, and therefore was satisfied.

2. *Quare*, whether parol evidence as to the character of the vessel was admissible to qualify the ordinary warranty of seaworthiness. *Clapham v. Langton*, 729

IX. Policy of insurance on ship at and from "L. to any port or ports in the South and North Pacific Oceans in any order backwards and forwards, and during thirty days' stay in her last port of discharge:" these words were written: in other respects the policy was in the usual printed form. The ship arrived at her last port of discharge at 7 p. m. on the 25th May, and anchored there, and so remained until the 24th June, on which day, at 3.45 a. m., she was driven on shore in a gale of wind and lost. Held, that the thirty days were to be reckoned from the expiration of the twenty-four hours after the ship had arrived at her last port of discharge, and therefore the loss was covered by the policy. *The Mercantile Marine Insurance Company, Limited, v. Titherington*, 766

X. The plaintiffs were agents in London of an insurance Company at Hong Kong, which had also an agent at Calcutta. Merchants at Calcutta desirous of effecting insurances with the Company make application to their agent before the goods are shipped, or the name of the intended ship known, or the quantity or particulars of the merchandise defined, and if the application is accepted a slip naming the risk accepted is delivered to the assured, and as soon as the particular ship is determined on a policy expressed to be upon the whole amount of merchandise consigned by that ship is drawn up and delivered to the assured: what quantity of merchandise is covered by the policy remains uncertain until actually shipped. The Company, not deeming it expedient to take upon themselves risks to a greater extent than 5000*l.* upon any one ship, the plaintiffs as their agents in London effected on their behalf, with the defendants and others, open policies of insurance to cover the excess of 5000*l.* upon any one ship. In accordance with this course of business the

plaintiffs effected a policy of insurance with the defendants, dated the 8th October, 1858, for 7000*l.* "Being on goods . . . part of 10,000*l.* to cover the excess of 5000*l.* which may be taken by the Calcutta agent of The Hong Kong Insurance Company on any one ship." The ships were described as "first class ship or ships as may be declared." From time to time, as the plaintiffs received advices stating the names of the ships and the particulars of the amounts of excess on each, they made declarations of the amounts and names of the ships to the defendants, and endorsements were made of those declarations upon the back of the policy. On the 14th February, 1859, before the preceding policy was fully appropriated, the plaintiffs effected a further policy of the same kind for 7000*l.*, with a memorandum "to follow and succeed policy 8th October, 1858." This policy was also appropriated by declarations endorsed thereon. A similar policy was effected by the plaintiffs with the defendants, dated the 31st March, 1859. On the 16th March, 1860, there remained 5000*l.* unappropriated on this policy. On the same day a telegram, dated Calcutta, March 10th, arrived in London, and was known to the plaintiffs and defendants, viz., "Ship R. G. burnt and scuttled some cargo will be saved." On the 17th March the plaintiffs appropriated the remaining 5000*l.* upon the policy of the 31st March, 1859, to other ships. On the 19th March, 1860, the plaintiffs effected a further policy in the usual terms for 10,000*l.* to follow and succeed the policy of the 31st March, 1859. On the 21st March the plaintiffs in due course received instructions from the Calcutta agent, despatched on the 15th February, for an insurance on the R. G., and immediately notified to the defendants that the declaration of insurance in excess of 5000*l.* on the cargo of the R. G. would be made upon the policy of the 19th March, and on the 26th March, having received the full particulars from Calcutta, endorsed on the policy a declaration of the amount in excess of 5000*l.* upon that ship. On the 24th March, 1860, before the last-mentioned policy was exhausted and while there remained upwards of 5000*l.* unappropriated upon it, the plaintiffs effected a further policy with the defendants for 20,000*l.* to follow the policy of the 19th March, 1860, and a memorandum was endorsed on the policy of the 19th March, 1860, as follows: "20,000*l.* to follow 25th March," such date being a mistake for the 24th March. Similar policies were from time to time effected during the currency of the preceding policy, and there remained upon the last of them an amount unappropriated more than sufficient to cover the amount for the R. G. Held, that the plaintiffs were entitled to recover in respect of the excess over 5000*l.* upon the cargo of the R. G., inasmuch as: (1) The fact of the loss of the R. G. being known at the time of the policy

of the 19th March, 1860, did not affect its validity; (2) it was not then known that the defendants' Company had any excess over 5000*l.* upon the cargo of the R. G.; and (3), *semble*, the plaintiffs would have been entitled to recover if it had been known. *Gledstones and Others v. The Corporation of the Royal Exchange Assurance*, 797

XI. The plaintiffs having declared on a policy of insurance with a count for money had and received, the defendants paid the amount of the premiums into Court on that count, pleading to the count on the policy so as to raise, amongst other defences, that of unseaworthiness. The plaintiffs took the money out of Court in satisfaction of the claim under the count for money had and received. At the trial the defence of unseaworthiness having been given up, a special case was stated for the opinion of this Court, which was afterwards taken into the Exchequer Chamber, and in both Courts it was held that the plaintiffs were entitled to recover as for an average loss. The amount of the average loss was referred to and ascertained by average-staters, but this not being done before the argument of the case, a nominal judgment for 3500*l.* was entered up for the purpose of taking the case into error. Held, that the plaintiffs were not entitled to enter judgment and take out execution for the entire amount of the average loss without giving credit to the defendants for the amount paid into Court and taken out by them. *Carr and Another v. The Royal Exchange Assurance Corporation. Carr and Another v. Sir Moses Montefiore, Bart.*, 941

INSURANCE COMPANY.

See COMPANY, INSURANCE.

INTERFERENCE WITH WATERCOURSE.

See BOARD OF HEALTH, I.

INTERNATIONAL LAW.

I. Stat. 6 & 7 Vict. c. 76, s. 1, enacts, that in case requisition shall be made by the authority of the United States of America, in pursuance of a treaty between them and this country of the 9th August, 1842, for the delivery up of any person charged with certain crimes therein specified, among which is "piracy," committed within the jurisdiction of the United States, who shall be found within the territories of her Majesty, such person may be apprehended and delivered up to justice: Held, by Crompton, Blackburn and Shee, JJ., dissentiente Cockburn, C. J., that "piracy" here must not be understood in the sense of piracy by the law of nations, but of acts made piracy by the municipal law of the United States. *In re Tiesman and others*, 645

II. In order to enable a justice of the peace to issue his warrant under this statute for the apprehension and committal for trial of an

accused person, it need not appear that there was an original warrant for his apprehension in the United States, or depositions taken against him there. *Id.*

III. The warrant of such justice of the peace need not allege that the evidence before him was taken upon oath. *Id.*

IV. Concessum. In time of peace any act of depredation on a ship is *prima facie* an act of piracy: but in time of war between two countries the presumption is that depredation by one of them on a ship of the other is an act of legitimate warfare. It is immaterial whether the act was done by soldiers or volunteers, and whether it was commanded by the belligerent state, or when done ratified by it. *Id.*

INTERROGATORIES.

In ejectment by landlord against lessee to recover possession of premises and enforce a forfeiture by reason of the defendant having underlet, the Court will not allow the plaintiff under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 51, to deliver interrogatories to the defendant, where the answers might subject him to a forfeiture of his interest as lessee. *Pye v. Butterfield and others*, 829

INTERRUPTION.

See WAY, RIGHT OF.

IRREMOVABILITY.

See PAUPER.

ISLE OF MAN.

See FOREIGN DOMINION OF CROWN.

JUDGE.

See CONTEMPT OF COURT.

JUDGMENT.

See INDICTMENT.

JURISDICTION.

See CONTEMPT OF COURT. INTERNATIONAL LAW.

Of Justices of the Peace. *See* JUSTICES OF THE PEACE, JURISDICTION OF.

Of Quarter Sessions. *See* QUARTER SESSIONS.

JUROR, INSULTING.

See CONTEMPT OF COURT, III.

JUSTICES OF THE PEACE.

Certificate of. *See* HIGHWAY, DIVERTING AND STOPPING UP.

Convicting. *See* QUARTER SESSIONS, II.

Jurisdiction of.

The appellants were apprehended and brought

before a magistrate charged with setting fire to the letters in a pillar box. On their appearance at a Petty Sessions to answer the charge, after witnesses had been examined and cross-examined, they were, at the application of the prosecutor, remanded on bail for a week. At the adjourned Sessions the attorney for the prosecution stated that he should proceed against the appellants under stat. 24 & 25 Vict. c. 97, s. 52, and asked their attorneys whether they would plead guilty to such charge, or whether further evidence should be offered in support of it; they answered that he must go on and prove his case: other witnesses were then examined and cross-examined; and after the case for the prosecution was closed, the attorneys for the appellants objected that as no information on oath had been taken, as required by sect. 62, and the appellants were not found committing the offence, they were not legally in custody, and therefore the justices had no jurisdiction to convict them of the offence then charged. The offence with which the appellants were first charged was a felony punishable under sect. 10; the offence of which they were convicted was punishable on summary conviction. Held, that the want of an information and a summons was cured by the appearance of the appellants before the justices, and that they had waived the objection that they were not legally in custody on a charge under sect. 52, and therefore the justices had jurisdiction to convict under that section. *Turner and another, appellants, Her Majesty's Postmaster General, respondent*, 756

Warrant of. See INTERNATIONAL LAW, II., III.

KEYS, HOUSE OF.

See FOREIGN DOMINION OF CROWN.

KNOWLEDGE OF LOSS.

See INSURANCE, MARINE, X.

LANDLORD'S TAXES.

See RATE, POOR, II.

LANDS CLAUSES CONSOLIDATION ACT.

I. The plaintiff was lessee of a public-house, situate in Crawford Passage: between Crawford Passage and Coppice Row was a public footway opposite the public-house and facing Bowling Green Lane across Coppice Row. The defendants, a railway Company, in the exercise of powers under their Acts, formed a tunnel under Coppice Row, being part of the railway which they were authorized to make, and put up a hoarding on each side of Coppice Row, and placed steps to enable the foot passengers to pass up on one side and down the other side of a bridge over the hoarding; and after twenty months restored the highways, footways and passages to their original state. Upon an inquiry before a jury summoned under The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c.

18, s. 68, the plaintiff gave evidence that immediately after Coppice Row was obstructed in front of Bowling Green Lane and the footway the number of passengers passing to and fro along Crawford Passage diminished, the custom to and trade of the public-house fell off, and did not again improve after the hoarding was removed, the traffic of the neighbourhood having been entirely altered by the railway works. The jury found that there was no damage done to the structure of the house or premises of the plaintiff, but that with respect to the claim for loss of profits he had sustained damages, which they assessed. In an action to recover that amount: held, by the Exchequer Chamber, consisting of per Erle, C. J., Pollock, C. B., Channell and Pigott, BB., reversing the judgment of the Queen's Bench, consisting of Cockburn, C. J., Blackburn, Mellor and Shée, JJ.; Byles and Keating, JJ., diss.; that the loss of custom occasioned to the plaintiff by the railway works was not an injurious affecting of his house within sect. 68, and therefore he was not entitled to compensation. *Rickett v. The Metropolitan Railway Company*, 149.

II. Under sect. 68 of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, a party entitled to compensation in respect of lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, if he desires to have the same settled by arbitration, must give notice in writing to the promoters of the undertaking, stating "the nature of the interest" in the lands; or, if he desires to have the question of compensation settled by a jury, he must give notice in writing to the promoters of the undertaking, stating "such particulars as aforesaid." Held, that the notice must state the quantity as well as quality of the estate or interest. *Healey v. The Thames Valley Railway Company*, 769

III. A claimant, who was occupier under a lease for years, gave a notice which stated "the said lands and hereditaments are held by me on lease, and are used partly as and for private grounds and partly for farming and agricultural purposes." Held, that it did not comply with sect. 68. *Id.*

IV. A railway Act, 7 & 8 Vict. c. xcii, ss. 216, 217, containing precisely similar provisions to those in The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 127, enacted that "for the purpose of making provision respecting the sale of lands acquired by the Company under the provisions of this Act, but which shall not be required for the purposes thereof," the Company should sell such superfluous lands within ten years after the passing of the Act; and if the Company did not sell such superfluous lands within the period aforesaid, they were to "vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent

of their lands respectively adjoining the same." A subsequent Act obtained by the same Company, 26 & 27 Vict. c. xcii. s. 28, enacted: "The respective periods by the several Acts relating to the Company limited for the sale of the superfluous lands are hereby respectively extended for five years from the passing of this Act, and those several Acts shall be read and construed as if that period had been fixed by each of those Acts respectively." The land of an owner adjoining to superfluous lands continued by a line nearly parallel with the railway until it met the land of another owner also adjoining such lands which slanted off from the railway: Held,

1. That these owners were not entitled to have the superfluous lands divided between them as tenants in common, nor apportioned between them according to the depth of their land or the limit of the frontage, but that the proper course was to draw a straight line from the point where the boundaries of the two adjoining owners met to the nearest point of the land actually used by the Company for their works, and allot the land on each side of that line to the respective owners.

2. That the words "lands acquired by the Company under the provisions of this Act, but which shall not be required for the purposes thereof," extended to lands the reversion to or other partial interest in which had been acquired by the Company, and were not confined to lands acquired with the right to immediate possession, so that the Company might enter upon and apply them to the purposes of the railway.

3. That stat. 26 & 27 Vict. c. xcii., had not the effect of defeating an interest previously vested under the provisions in the former Act. *Moody v. Corbett and Others, and The London, Brighton and South Coast Railway Company*, 859

LAY RECTOR.

See ECCLESIASTICAL LAW, II.

LEASE.

An agreement for an agricultural lease contained a stipulation that the tenant should perform each year for the landlord, "at the rate of one day's team-work with two horses and one proper person for every 50*l.* of rent when required (except at hay and corn harvest) without being paid for the same." In ejectment for a forfeiture, Held,

1. That the work thus to be performed meant any work for which teams are generally used, and therefore included drawing coals to B. Palace. Per Cockburn, C. J., Wightman, Blackburn, and Mellor, JJ.

2. That the tenant was not bound to supply a cart or other vehicle for the purpose of the work: per Crompton and Blackburn, JJ.; dissentiente Mellor, J. *The Duke of Marlborough v. Osborn*,

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LEVELLING STREET.

See BOARD OF HEALTH, II.

LICENSE.

See ELECTION. INSURANCE, LIFE. POLICE, COMMISSIONERS OF.

LLOYD'S BONDS.

See COMPANY, RAILWAY, IV.

LOCAL.

Board of Health. See BOARD OF HEALTH, I., II., III., IV.

Government Act. See BOARD OF HEALTH, I.

Sewers Tax. See RATE, POOR, II.

LONDON (CITY) SMALL DEBTS
EXTENSION ACT.

See BILL OF EXCHANGE.

LOSS.

Average. See INSURANCE, MARINE, II., V., VII.

Of custom. See LANDS CLAUSES CONSOLIDATION ACT, I.

Knowledge of. See INSURANCE, MARINE, X.

MACHINERY, VALUE OF.

See INSURANCE, MARINE, II.

MAGISTRATE.

See HUSBAND AND WIFE.

MANAGING CLERK.

See ARTICLED CLERK, II.

MANDAMUS.

See BOARD OF HEALTH, I., III.

MAN, ISLE OF.

See FOREIGN DOMINION OF CROWN.

MANSLAUGHTER.

See CORONER, I., II., III.

MARINE INSURANCE.

See INSURANCE, MARINE.

MARKET OVERT.

See SALE.

MASTER AND SERVANT.

M. was employed by a railway Company as their servant to do work as a carpenter to the roof of an engine shed at their station whilst the railway traffic was being carried on in it by their servants. In the course of this employment he was standing upon a scaffold which was erected near to one of the turntables. The porters of the Company who were engaged in shifting a locomotive engine allowed

It to project so far beyond the turntable that, in turning it, the end of the engine, by their negligence, struck against a ladder which constituted one of the supports of the scaffold. The scaffold gave way in consequence, and the plaintiff was thrown off and injured. In an action by M. against the Company: Held, by the Exch. Ch., affirming the judgment of the Court below, that the nature of M.'s employment was such as to make him and the servants by whose negligence he suffered servants in a common employment, within the rule which exempts the employer from responsibility to his servant for the consequences of the negligence of a servant in a common employment. *Morgan v. The Vale of Neath Railway Company*, 736

MATERIAL FACT.

Concealment of. See **INSURANCE, MARINE, V., VI., VIII.**

MEASURE OF DAMAGES.

See **INSURANCE, LIFE.**

MEMORANDA.

Hilary Vacation, 1864, 148.

Trinity Term, 1864, 722.

Trinity Vacation, 1864, 755.

MEMORANDUM.

On policy of marine insurance.

1. Common. See **INSURANCE, MARINE, II., III.**

2. Special. See *Id.*, VIII., X.

METROPOLIS LOCAL MANAGEMENT ACT.

I. A District Board of Works, constituted under The Metropolis Local Management Act, 18 & 19 Vict. c. 120, are not empowered by that Act to pollute water flowing through the land of another person, and are therefore liable to an action at the suit of the owner of the land through which it flows, who is consequently not bound to proceed for redress by seeking compensation under that statute. Per the Exchequer Chamber, consisting of Erle, C. J., Byles and Keating, JJ., and Channell and Bramwell, BB.; diss. Pollock, C. B., and Pigott, B. *Cator v. The Board of Works for the Lewisham District*, 115

II. It makes no difference in this respect that the works executed by the District Board were necessary for the abatement of a nuisance, even in the land of the party injured. *Id.*

III. Nor that the water thus polluted lay outside the district over which the authority of the District Board extended. *Id.*; reversing the decision of the Queen's Bench, consisting of Cockburn, C. J., and Blackburn, J. *Id.*

IV. *Quere*, whether the Metropolitan Board of Works are so empowered by the Act? *Id.*

V. A. was empowered under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, ss. 77, 110, 111, to make a drain from his premises to a sewer, by cutting a trench across a highway, and filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B.: Held by the Exchequer Chamber, reversing the decision of the Queen's Bench, that A. was responsible in an action by B. *Gray and Wife v. Pullen and Hubble*, 970

MIDDLE LEVEL DRAINAGE COMMISSIONERS.

See **PUBLIC PURPOSES, TRUSTEES FOR, I.**

MILL, COTTON.

See **RATE, POOR, I.**

MONEY HAD AND RECEIVED.

The defendant chartered a ship to K. at a certain rate per week, to be paid every four weeks in advance. On the second payment becoming due, K. received from the plaintiff, through whom he had sub-chartered the ship to B., a check for half the amount due, payable to the order of the defendant, upon the terms that K. should inform the defendant that the advance was made in consideration that the ship should be allowed to perform the charter. K. paid the check to the defendant; but omitted to inform him of the terms on which it had been given, and he had no notice of them; and, the remainder of the money being unpaid, the defendant, who had obtained cash for the check, stopped the ship: Held, by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that an action for money had and received to recover the amount of the check was not maintainable by the plaintiff against the defendant, as there was no privity between them, and that the action, if any, ought to have been brought by K. *Watson v. Russell*, 968

See **INSURANCE, MARINE, IX.**

MONEY, PAYMENT OF, INTO COURT.

See **INSURANCE, MARINE, XI.**

NEGLIGENCE.

See **METROPOLIS LOCAL MANAGEMENT ACT, V. OBLIGATION, STATUTORY. PUBLIC PURPOSES, TRUSTEES FOR, I.**

Of fellow-servant. See **MASTER AND SERVANT.**

NEGOTIABLE INSTRUMENT.

See **BANKRUPT, V.**

NETS.

See FISHERY, SALMON.

NON-REPAIR OF HIGHWAY.

See HIGHWAY, REPAIR OF.

NOTICE.

Of appeal. *See* QUARTER SESSIONS, II.

Of bill of exchange. *See* BILL OF EXCHANGE, II, III.

Under Lands Clauses Consolidation Act. *See* LANDS CLAUSES CONSOLIDATION ACT, II, III.

NUISANCE.

The owner of a messuage and premises, attached to which was an area, let the same to a tenant from year to year, and died; having devised the property, with an iron grating over the area improperly constructed and out of repair so as to amount to a nuisance, to the defendant. The defendant, having no notice of the nuisance, suffered the tenant to remain in the occupation of the premises, upon the same terms as before, receiving rent. The wife of A. having sustained damage by reason of the dangerous condition of the grating: held, by the Court of Queen's Bench, that the defendant, as reversioner, was liable to an action for the damage thereby occasioned. *Quære* by the Exchequer Chamber? *Gandy and Wife v. Jubber*, 485

See BOARD OF HEALTH, I., III. METROPOLIS LOCAL MANAGEMENT ACT.

OATH.

See INTERNATIONAL LAW, III.

OBLIGATION, STATUTORY.

Where a statutory obligation is imposed on a person, he is liable for any injury that arises to others in consequence of its having been negligently performed, and this whether it were performed by himself or by a contractor employed by him. *Gray and Wife v. Pullen and Hubble*, 970

OFFICE.

See ECCLESIASTICAL LAW, V.

OPEN POLICY.

See INSURANCE, MARINE, III.

ORDER.

In Council. *See* ECCLESIASTICAL LAW, III.

Protection. *See* HUSBAND AND WIFE.

OVERCARRIAGE BY RAILWAY.

See COMPANY, RAILWAY, VI.

OVERT, MARKET.

See SALE.

PARISH.

See PAUPER.

Church. *See* ECCLESIASTICAL LAW, I., II.

PAROL EVIDENCE.

See INSURANCE, MARINE, VIII.

PARTICULAR AVERAGE.

See INSURANCE, MARINE, II.

PARTNERSHIP.

See DRAMATIC LITERARY PROPERTY.

PAUPER.

Stat. 9 & 10 Vict. c. 66, s. 1, enacts that no person shall be removed from any parish in which he shall have resided for the five preceding years. By stat. 24 & 25 Vict. c. 55, s. 1, "the period of three years shall be substituted for that of five years in" the former Act, "and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish." Held, per Cockburn, C. J., and Shee, J., Crompton, J., dissentiente, that a pauper who, having resided three years in a parish, removed to another parish in the same union, and after residing there for some months, became chargeable, was removable to the parish of his settlement. *The Queen v. The Inhabitants of Great Salheld*, 377

See BANKRUPT, I.

PAYMENT.

See COVENANT FOR TITLE.

Of money into Court. *See* INSURANCE, MARINE, XI.

PERFORMANCE OF CONDITIONS.

See VEXATIOUS INDICTMENTS ACT.

PERSONAL INJURY.

To crew under running-down clause. *See* INSURANCE, MARINE, I.

PERSONAL REPRESENTATIVE.

Action by. *See* INSURANCE, MARINE, I.

PETITION.

In formâ pauperis. *See* BANKRUPT, I.

PIRACY.

See INTERNATIONAL LAW.

PLEADING.

See BANKRUPT, II., III., VI.

POLICE, COMMISSIONERS OF.

A person holding the license of conductor of a metropolitan stage carriage, under stat.

6 & 7 Vict. c. 86, had been convicted and fined three times by justices, who, however, did not revoke or suspend his license, as they were empowered to do by sect. 25. On his applying for a renewal of his license in the mode prescribed by that Act, the Commissioners of Police, under stat. 13 & 14 Vict. c. 7, refused it, on the ground of the convictions, but said they would grant it after a month: Held that they were justified in this course. *Ex parte Mit-
cham*, 585

POLICY.

See INSURANCE.

POLLUTION OF WATER.

See METROPOLIS LOCAL MANAGEMENT ACT, I, II, III, IV.

POOR-RATE.

See RATE, POOR.

PORT OF DISCHARGE.

Days in, how counted. See INSURANCE, MARINE, IX.

POSSESSION OF PARISH CHURCH.

See ECCLESIASTICAL LAW, I, II.

POST-HORSE DUTY.

See TOWNS POLICE CLAUSES ACT.

PREMIUM.

See INSURANCE, MARINE, XI.

PRESUMPTION.

See INTERNATIONAL LAW, IV.

PRIVITY OF CONTRACT.

See MONEY HAD AND RECEIVED.

PROCEDURE, SUMMARY.

See BILL OF EXCHANGE, I.

PROTECTION ORDER.

See HUSBAND AND WIFE.

PUBLIC HEALTH.

See BOARD OF HEALTH.

PUBLIC PURPOSES, TRUSTEES FOR.

I. The Middle Level Drainage Commissioners were empowered and directed by statute to make a cut, and make and maintain at or near its opening a sluice to exclude the tidal waters. They were trustees for a public purpose, and acting without reward. The sluice was properly made, but owing to the absence of due care and skill in the persons employed by them to maintain it, the sluice burst, whereby the tidal waters came in and flooded the neighbouring lands. There was no proof that the Commissioners had negligently or improperly employed un-

skillful or incompetent agents. Held, that the Commissioners were not liable to an action at the suit of the owners of the neighbouring lands: per Cockburn, C. J., and Mellor, J.; dissentiente Blackburn, J. See *Coe v. Wise, Clerk to the Middle Level Drainage Commissioners*, 440

II. Commissioners acting gratuitously in the discharge of a public trust are responsible, in an action for injury caused by a breach of duty on their part, without showing affirmatively that they are possessed of funds, or the means of raising funds, to meet any damages which may be recovered against them. *Osby and Wife v. The Ryde Commissioners*, 743

PUBLIC TRUST.

See PUBLIC PURPOSES.

PURCHASE.

See COVENANT FOR TITLE.

QUALIFIED COVENANT.

See COVENANT FOR TITLE.

QUARTER SESSIONS.

I. An indictment at Quarter Sessions alleged that the defendants, contriving and intending to defraud R. B. of his money, unlawfully, knowingly, and designedly did amongst themselves combine, conspire, confederate and agree together by divers false pretences against the form of the statute in that case made and provided, the said R. B. of his moneys to defraud, against the form of the statute: held, that the Quarter Sessions had jurisdiction to try this. *Latham and Others v. The Queen*, 635

II. A person convicted as a rogue and vagabond under stat. 5 G. 4, c. 83, s. 4, appealed to the Quarter Sessions under sect. 14 of the Act, having given notice of appeal to the convicting justices as required by that section. No one appearing to support the conviction, it was quashed. Held, that the Quarter Sessions were authorized by stat. 12 & 13 Vict. c. 45, s. 5, to award costs against the person who prosecuted the appellant, and could not award them against the convicting justices. *The Queen v. Purdey*, 909

See also CONTEMPT OF COURT. HIGHWAY, DIVERTING AND STOPPING UP, II.

QUEEN'S BENCH, COURT OF.

See CONTEMPT OF COURT, I, III.

QUO WARRANTO.

See ECCLESIASTICAL LAW, V.

RAILWAY COMPANY.

See COMPANY, RAILWAY.

RAILWAY AND CANAL TRAFFIC ACT.

See COMPANY, RAILWAY, I, V, VI.

RATE.

District. See **BOARD OF HEALTH, IV., V., VI.**

Highway.

The parish of A. contains several hamlets, all included in the poor-rate for the parish, with one set of overseers. M., one of these hamlets adjoining the parish of B., had, so far as living memory extends, been assessed to the property and income tax, land tax and assessed taxes as part of B. The occupiers of land in M. have at various times held the offices of guardian of the poor, overseer, churchwarden and dike-reeve for A., and had never held similar offices in B. M. had time out of mind paid poor-rates, church-rates, sewer-rates and tithes to A. So far as living memory and evidence of reputation went, the occupiers of lands in M. had always been assessed and had contributed to the highway-rates of B., and the highways in M. had always been repaired by B. until 1841, when, by private arrangement with the surveyors of the highways of B., the lands in M. ceased to be assessed in that parish; and the highways in M. have still been repaired by the occupiers of lands in M. without any rate, the surveyors of the highways of B. expressly reserving to themselves the right of assessing the lands in M. to the highway-rates at any future time. Held,

1. That M. was assessable to the highway-rate for A., there not being sufficient evidence to warrant the conclusion that M. was a hamlet repairing its highways separately.

2. That B. and M. could not be jointly indicted for the non-repair of highways in M. *Dawson*, appellant, *The Surveyor of Highways for the parish of Willoughby with Sloodby*, respondent, 920

Poor.

I. A cotton-mill, owing to depression in the cotton trade, was no longer worked, but was maintained at some expense as a factory, with its machinery in a fit state for working when the trade should revive. Held, that the occupiers were rateable for the mill, and that the rate should be made upon its annual value as a storehouse for the machinery in it, and not upon an estimate of the rent which might fairly be expected for it, if let for a reasonable term of years, with the prospect of improvement in value. *Staley and another*, appellants, *The Overseers of the Township of Castleton*, respondents, 505

II. In assessing land to the poor-rate the owner and occupier is entitled, under stat. 6 & 7 W. 4, c. 96, s. 1, to have deductions made from the gross rateable value of his property (1) in respect of the general sewers tax imposed by the Court of the Commission of Sewers, under stat. 4 & 5 Vict. c. 45; (2) in respect of the amount at which he is rated by the Court of the Commission of Sewers for the main-

tenance and cleansing of the sewers and works in a Level by which the rated lands are benefited; (3) in respect of the average sum annually expended by him in the maintenance and repairs of a sluice or floodgate and gate, under the jurisdiction of the Commissioners, and on his lands, by which his lands alone are benefited, and which works are necessary to maintain the lands in a state to command their rent; (4) in respect of the sum annually expended by him in the maintenance and repairs of a sea wall which the owners of lands fronting a navigable river were bound to keep up under a presentment made at a Court of Sewers, and the maintenance of which wall was necessary to protect his lands: as all the above are tenant's and not landlord's taxes: *Cockburn, C. J.*, dubitante about the third head and *Mellor, J.*, about the two last. *The Queen v. Hall Dare*, 785

RATIFICATION.

See **INTERNATIONAL LAW, IV.**

RECOGNISANCE.

See **VEXATIOUS INDICTMENTS ACT.**

RECOVERIES.

See **FINES AND RECOVERIES.**

RECTOR, LAY.

See **ECCLESIASTICAL LAW, II.**

REDUCTION OF DAMAGES.

See **APPEAL. CHARTER-PARTY.**

REGULA GENERALIS, 721.

REGISTRAR.

Adjudication by. See **BANKRUPT, I.**

REGISTRATION.

See **COPYRIGHT OF DESIGNS.**

RELATION.

See **BANKRUPT, I.**

RELEASE.

See **BANKRUPT, II., III., V.**

RELOADING, CONSTRUCTIVE.

See **INSURANCE, MARINE, V.**

REMOVABILITY.

See **PAUPER.**

RENEWAL OF LICENSE.

See **POLICE, COMMISSIONERS OF.**

REPAIR OF HIGHWAY.

See **HIGHWAY, REPAIR OF. COMPANY, RAILWAY, II.**

RESIDENCE IN UNION.

See **PAUPER.**

REVERSIONER, LIABILITY OF.*See* NUISANCE.**ROAD, TURNPIKE.***See* HIGHWAY, REPAIR OF.**ROGUE AND VAGABOND.***See* QUARTER SESSIONS, II.**RULE TO REDUCE DAMAGES.***See* APPEAL.**RUNNING-DOWN CLAUSE.***See* INSURANCE, MARINE, I.**SALE.**

I. A sale by sample is not entitled to the privileges of a sale in market overt. *Crane v. The London Dock Company*, 813

II. *Quære*, whether a purchase of goods made in a market, by a shopkeeper, of goods brought to his shop is so entitled? *Id.*

Bill of. *See* BANKRUPT, I.

SALMON FISHERY.*See* FISHERY, SALMON.**SAMPLE.***See* SALE, I.**SEAL OF LOCAL BOARD OF HEALTH.***See* BOARD OF HEALTH, IV.**SEAWORTHINESS.***See* INSURANCE, MARINE, VIII, XI.**SEA WALL.***See* RATE, POOR, II.**SEIZURE.***See* BANKRUPT, I.**SEQUESTRATION.***See* BANKRUPT, VII.**SERVANT.***See* MASTER AND SERVANT.**SERVICE.***See* ARTICLED CLERK.**SESSIONS, QUARTER.**

See CONTEMPT OF COURT, III. *QUARTER SESSIONS.*

SEVERAL COUNTS.*See* INDICTMENT.**SEWER.***See* BOARD OF HEALTH, I, III.**SEWERS TAX.***See* RATE, POOR, II.**SHIP, DECLARATION OF.***See* INSURANCE, MARINE, VIII, X.**SHOP.***See* SALE, II.**SLANDER.**

Declaration by husband and wife, alleging that she was a member of a sect of Protestant Dissenters, and also a member of one of the private societies of that sect, and that the sect and its Societies are subject to rules and regulations, and the members of the sect and its Societies are subject to rules and regulations, and under the control and authority of the Societies and of their leaders with respect to the moral and religious conduct of the members and their being allowed to be and continue members; and by the rules and regulations a member of one Society in the sect cannot become a member of another Society in the sect unless the leaders or elders of the first certify that the member is morally and otherwise fit to be a member, and that, by reason of words spoken of the wife imputing want of chastity to her, she was not allowed to continue a member of the Society, and the leaders or elders refused to certify that she was morally or otherwise fit to be a member of the sect, &c., and she was not allowed to become a member of the Society in L., and was prevented from attending religious worship, and she became injured in her good name and reputation, and sick and greatly distressed in body and mind. On demurrer: held, that the special damage alleged was not sufficient to make the words actionable. *Roberts and Wife v. Roberts*, 384

SPECIAL.

Damage. *See* SLANDER.

Memorandum. *See* INSURANCE, MARINE, VIII, X.

STATUTORY OBLIGATION.*See* OBLIGATION, STATUTORY.**STEAMER.***See* INSURANCE, MARINE, II.**STIPULATION.***See* LEASE.**STOPPING UP HIGHWAY.***See* HIGHWAY, DIVERTING, &c.**STOREHOUSE.***See* RATE, POOR, I.**STREAM.***See* BOARD OF HEALTH, I, III.**STREET.***See* BOARD OF HEALTH, II.

SUMMARY.

Conviction. See JUSTICES OF THE PEACE, JURISDICTION OF.

Procedure. See BILL OF EXCHANGE, I.

SUMMONS, WANT OF.

See JUSTICES OF THE PEACE, JURISDICTION OF.

SUPERFLUOUS LANDS.

See LANDS CLAUSES CONSOLIDATION ACT, IV.

SUPER VISUM CORPORIS.

See CORONER, III.

SURETY.

See BANKRUPT, I., V., VI.

TAXES.

Landlord's. See RATE, POOR, II.

Tenant's. See RATE, POOR, II.

TEAM WORK.

See LEASE.

TENANCY FROM YEAR TO YEAR.

A tenancy from year to year is not, at least for the purpose of an action for a nuisance, to be treated as a continuous tenancy, but as recommencing every year. *Gandy and Wife v. Jubber*, 78

TITLE, COVENANT FOR.

See COVENANT.

TOWNS.

Improvement Clauses Act, 1847.

The Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34, s. 52, imposes on the Commissioners under that Act an obligation to place fences on the footways for the protection of foot passengers. *Ohrby and Wife v. The Ryde Commissioners*, 743

Police Clauses Act.

A person using a hackney carriage plying for hire in a town is not exempted from the obligation of taking out a license under The Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, on the ground that he has already paid post-horse duty to the Commissioners of Inland Revenue. *Buckle, Appellant, Wrightson, Respondent*, 854

TRENCH ACROSS HIGHWAY.

See METROPOLIS LOCAL MANAGEMENT ACT, V.

TRUST, PUBLIC.

See PUBLIC PURPOSES, TRUSTEES FOR.

TURNPIKE ROAD.

See HIGHWAY, REPAIR OF.

UNCHASTITY.

See SLANDER.

UNDERLEASE.

See INTERROGATORIES.

UNION, RESIDENCE IN.

See PAUPER.

UNREASONABLE CONDITION.

See BANKRUPT, V. COMPANY, RAILWAY, V. VI.

UNSEAWORTHINESS.

See INSURANCE, MARINE, VIII., XI.

VAGRANT.

See EVIDENCE. QUARTER SESSIONS, II.

VALUED POLICY.

See INSURANCE, MARINE, III.

VENDOR.

See COVENANT FOR TITLE. FINES AND RECOVERIES.

VENUE, ABUSE OF CHANGING.

Where a party at whose instance the venue has been changed abuses his position by retaining counsel in such a manner as to deprive his adversary of the means of procuring counsel, the Court or a Judge will interfere. *Curtis v. Lewis*, 568

VERDICT.

See INDICTMENT.

VEXATIOUS.

Defence. See HIGHWAY, REPAIR OF. Indictments Act.

By stat. 22 & 23 Vict. c. 17, s. 1, no bill of indictment for conspiracy, among other offences, shall be presented to or found by any grand jury unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction or with the consent in writing of a Judge or of the Attorney or Solicitor General. Three defendants were severally bound by recognisance to appear at the next Session of the Central Criminal Court, and there surrender themselves, and plead to such indictment as might be found against them for or in respect of the charge of conspiracy to cheat and defraud. The prosecutors were also bound over to appear at such next Session, and to prefer or cause to be preferred a bill of indict-

ment against the persons accused for the offence of conspiracy to cheat and defraud, and duly to prosecute such indictment and give evidence thereon. At the next Session an indictment was preferred and found, and the defendants surrendered; but in consequence of the absence of a material witness for the prosecution the trial was put off, and the recognisances duly respited until the next Session. Before the next Session the Solicitor-General directed an indictment for a conspiracy to be preferred against a fourth defendant, C. D.; and a second indictment was preferred and found against them all, upon which the original defendants appeared, but refused to plead. A plea of not guilty was entered for them, and they were tried and found guilty and sentenced. On a writ of error Held,

1. That it was not necessary that the indictment should aver that the conditions imposed by stat. 22 & 23 Vict. c. 17, s. 1, had been performed, *e. g.*, that it had been preferred by the direction or with the consent of a Judge or of the Attorney or Solicitor General.

2. That the indictment was preferred with proper authority, and the recognisances duly entered into, as the charge on which the defendants were tried was the same as that to which the recognisances related; and those recognisances were not exhausted by the first indictment being preferred and the defendants surrendering. *Knowlden and others v. The Queen*, 532

VICAR.

See ECCLESIASTICAL LAW.

VOYAGE POLICY.

See INSURANCE MARINE, III.

WAIVER.

See ELECTION. JUSTICES OF THE PEACE, JURISDICTION OF.

WARRANT OF JUSTICE OF THE PEACE.

See INTERNATIONAL LAW, II., III.

WARRANTY OF SEAWORTHINESS.

See INSURANCE, MARINE, VIII.

WATER POLLUTION.

See METROPOLIS LOCAL MANAGEMENT ACT, I. II., III., IV.

WATERCOURSE.

See BOARD OF HEALTH, I., III.

WAY, RIGHT OF.

Trespass for breaking and entering the plaintiff's garden. The defendant justified under two pleas, viz., the enjoyment as of right and without interruption of a way over the garden for twenty years and forty years respectively before the suit. At the trial it

appeared that the plaintiff was tenant to W. L. of the garden, and the defendant was owner of premises comprising a cottage and yard, which had formerly been part of the estates of the L. family, with a privy in the yard abutting upon the garden, which privy had stood there for sixty years. J. L., who died in 1811, was owner of the garden and the premises belonging to the defendant, and devised certain of his estates, including those premises, to H. L. in trust to sell. H. L. sold various lots, and in 1812 W. became the purchaser of a lot which included those premises. In 1821 W. built the cottage, and on his death in 1849 the premises devolved to the defendant in right of his wife, who was heiress of W. In 1823 S. became tenant of the garden, and continued so until 1857. In 1830 he walled up stones against the opening of the privy into the garden, and W. knocked them down. S. complained of that act to H. L., who went with his agent to look at the place, and met there S. and W. Declarations of W. and H. L. on that occasion were admitted in evidence after objection by the plaintiff. A low wall was accordingly built round and a loose flagstone put at the top so as to form a cesspool, and the privy was cleaned out through the garden until about 1852. Under the will of J. L. the garden came to W. L. on his attaining the age of twenty-one years, in 1817. After the declarations were given in evidence, it appeared that H. L. was trustee of W. L. during his minority, and subsequently by his request received his rents. In October, 1861, the tenant of the garden, by direction of W. L. built a wall to prevent the defendant going through it. A correspondence between the attorneys for the defendant and W. L., in which there was a negotiation as to a reference of the matter to arbitration, began on the 28th December of that year, and continued until the 13th February, 1862. The trespass for which the action was brought was committed on the 3d February, 1863; and the writ issued on the following day. The Judge left to the jury the question whether the defendant had submitted to or acquiesced in the interruption for one year within the meaning of stat. 2 & 3 W. 4, c. 71, s. 4, and they said that he had not, and found for him on both pleas. Held, per Crompton, Blackburn, and Mellor, JJ.,

1. That the question was properly left to the jury, as an interruption might be shown to have been not submitted to or acquiesced in within the meaning of stat. 2 & 3 W. 4, c. 71, s. 4, though no suit or action had been brought.

2. That the declaration of W. was admissible as explanatory of acts about to be done by him, showing the nature of the enjoyment of the way.

3. *Semble*, per Crompton and Blackburn, JJ., that, even taking H. L. as a stranger to

the estate at the time of the conversation between him and S. and W., his declaration was admissible as part of the conversation. *Bennison v. Cartwright*, 1

WEIGHING-MACHINE.

A weighing-machine which has become out of order so as to weigh untruly is an incorrect weighing-machine within stat. 5 & 6 W. 4, c. 63, s. 28, although by making an allowance for the error the weight of articles could be ascertained truly by it: *aliter*, where a machine from its construction requires to be adjusted

before it can be used at all. *The Great Western Railway Company, Appellants, Bailie, Respondent*, 928

WIFE.

See HUSBAND AND WIFE. EVIDENCE. SLANDER.

WITNESS, COMPETENCY OF.

See EVIDENCE.

YEAR TO YEAR, TENANCY FOR.

See TENANCY FROM YEAR TO YEAR.

THE END.

